

NUNN-WOLFOWITZ TASK FORCE REPORT:
INDUSTRY “BEST PRACTICES”
REGARDING EXPORT COMPLIANCE PROGRAMS

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I. INTRODUCTION

On December 1, 1999, the Board of Directors of Hughes Electronics Corporation (the “Board”) approved the Nunn-Wolfowitz Task Force Charter (the “Charter”). The Charter commissions former Senator Sam Nunn and Ambassador Paul Wolfowitz, supported by personnel from King & Spalding (collectively the “Task Force”),¹ to make recommendations to the Board concerning any changes in Hughes’ operations and procedures that may be necessary or desirable to ensure that it has in place a “best practices” standard for complying with the letter and spirit of U.S. export control laws and regulations (the “Mission”).

To accomplish this Mission, the Task Force interviewed numerous industry and government personnel involved in export compliance to determine industry “best practices” regarding export compliance. The Task Force and Hughes believe that the identification of these “best practices” may prove useful for other companies in their efforts to comply with U.S. export control requirements.

This report describes the Task Force investigation methodology, summarizes various export laws and regulations,² and outlines industry “best practices” related to 12 key areas of export compliance: Management Commitment; Compliance Council; Compliance Personnel; Instruction Manuals; Intranet Site; Training and Education; License Application Process; Implementing License Authorizations; Handling Foreign National Issues; Recordkeeping; Audits; and Handling Suspected Violations.³

As used in this report, the term “best practices” refers to those practices that generally should be incorporated into an export compliance program to maximize its effectiveness. These standards cannot be mechanically or rigidly applied, however, because companies vary greatly in their location, size, employees, customers, business operations, organizational structure, corporate philosophy, and—most importantly—nature and scope of their export issues. Thus, the presence of any specific practice does not necessarily guarantee an effective compliance program, nor does the absence of a specific practice necessarily indicate an ineffective program. Moreover, each company must identify, from a management perspective, the best method to allocate its personnel, systems, and budget to satisfy business and export compliance requirements. The Task Force is cognizant of the potentially significant resources that would be necessary to implement every “best practice” articulated herein, and that in some cases the implementation of a “best practice” may be impractical or unnecessary. The application of these standards must be tailored to each company to produce the most effective compliance system.

The Task Force also notes that executive branch and judicial branch authorities strongly encourage formalized compliance programs. Both the Departments of State and Commerce have acknowledged that compliance programs may justify the mitigation of civil penalties in certain cases. Similarly, the Federal Sentencing Guidelines have designated compliance programs as

¹ The Task Force was subsequently expanded to include William Schneider, President of International Planning Services, Inc.

² The Task Force does not purport to interpret the Export Administration Regulations, International Traffic in Arms Regulations, or any other law.

³ A chart summarizing the “best practices” related to these 12 areas is attached at Appendix A.

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one factor that may reduce criminal penalties imposed by the government for non-compliance with export laws. In the widely-cited case In re Caremark International Derivative Litigation,⁴ which involved the settlement of shareholder claims against individual board members for failure to prevent health care fraud, the adoption of a compliance program was instrumental in the court's finding that the directors would probably not have been found personally liable had the case gone to trial. The court stated that "it is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility."⁵

Thus, effective compliance programs can serve as evidence of senior management's good faith and reasonable attempts to comply with the law. More importantly, export control compliance will help to promote and protect not only personal and corporate interests, but also U.S. national security, foreign policy, and commercial interests.

II. TASK FORCE INVESTIGATION METHODOLOGY

The Task Force developed and implemented a four-pronged approach in determining industry "best practices" in export compliance. First, the Task Force reviewed relevant export control laws and regulations, focusing primarily on the regulations administered by the State and Commerce Departments.

Second, the Task Force interviewed various personnel from the Commerce Department, State Department, the Defense Department and the Customs Service—the government agencies primarily responsible for administering and enforcing the export control laws applicable to Hughes. The Task Force also reviewed the "Defense Trade Compliance Programs Guide" published by the State Department's Office of Defense Trade Controls and the "Export Management System Guidelines" published by the Commerce Department's Bureau of Export Administration.

Third, the Task Force interviewed export compliance personnel and representatives from Hughes and other industry leaders and organizations, including The Boeing Company, Lockheed Martin Corporation, General Electric Company, Litton Industries, Hewlett-Packard Company, Northrop-Grumman, the Aerospace Industries Association, the Society for International Affairs, and the Satellite Industry Association.

Fourth, the Task Force met with other individuals whom the Task Force believed had potentially valuable input. For example, the Task Force met with U.S. Representative Christopher Cox, who chaired the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China; Doug Feith, partner at the law firm of Feith & Zell; Clark McFadden, partner at the law firm of Dewey Ballentine; Dan Poneman, partner at the law firm of Hogan & Hartson; and Larry Christensen and Jim Wilson of Vastera, an international trade consulting company.

⁴ 698 A.2d 959 (Del. Ch. 1996).

⁵ Id. at 970.

III. EXPORT LAWS AND REGULATIONS

A. STATE DEPARTMENT REGULATIONS

Under the Arms Export Control Act (“AECA”), the Office of Defense Trade Controls (“ODTC”) at the State Department is charged with implementing the International Traffic in Arms Regulations (“ITAR”). The ITAR regulate the export of defense articles and defense services from the United States to any foreign destination or to any foreign person, whether located in the United States or abroad. A “defense article” is defined as any item or technical data designated in the United States Munitions List (“USML”).⁶ A “defense service,” on the other hand, is defined as “[t]he furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.”⁷ The ITAR do not define “assistance.”

ITAR controls are based on national security/nonproliferation and foreign policy considerations. There is considerable overlap among the policies underlying the ITAR and the Export Administration Regulations administered by the Commerce Department. Nevertheless, the objective of ITAR is to limit access to and use of “munitions” and related services and data—as opposed to dual-use items and technologies—to purposes and end-users that serve the foreign policy interests of the United States. As a result, the State Department is generally considered much less sensitive to commercial considerations than the Commerce Department.

A company desiring to export a defense article or provide a defense service must apply for a license from ODTC. License applications submitted to the State Department are generally reviewed by the State and Defense Departments; there is consultation, where appropriate, with the intelligence community and other interagency bodies.⁸

License applications can be: (1) approved; (2) denied; or (3) returned without action. The approval may be limited in scope by provisos, limitations or requirements appended to the approval by the reviewing agencies. The State Department considers numerous factors in making a licensing determination but places primary importance on foreign policy and national security concerns, as required by statute.⁹

State Department personnel advised the Task Force that in Fiscal Year 1999, ODTC received approximately 45,000 applications and had 14 non-supervisory employees, three supervisory employees, and four military detailees to process license applications. As a result of additional appropriations in Fiscal Year 1999 and Fiscal Year 2000, the total number of non-supervisory employees in ODTC’s Licensing Branch will grow to 30. ODTC officials believe the staff increase will permit them to achieve nearly a factor of four reduction in case processing time (from 98 calendar days in Fiscal Year 1999 to 24 days by the end of Fiscal Year 2000).

⁶ 22 C.F.R. § 120.6.

⁷ 22 C.F.R. § 120.9.

⁸ GAO/T-NSIAD-98-208 (June 1998) (“GAO Report”), p.3.

⁹ GAO Report, p.3.

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State Department personnel further advised the Task Force that the total personnel complement for Fiscal Year 2000 will be 68.

On March 15, 1999, the Fiscal Year 1999 National Defense Authorization Act¹⁰ transferred all satellites and related items from the Commerce Control List to the USML, thereby transferring license jurisdiction for these items from Commerce to State. This transfer of jurisdiction has had a significant impact on satellite manufacturers, components/parts providers, and service providers. Under the Commerce regime, many satellite products and services fell under exceptions and did not require licenses for exports. Under the State regime, however, licenses are required for most transactions involving satellite products and services.

Effective July 1, 2000, the State Department changed the ITAR to simplify procedures for obtaining export licenses with respect to commercial communications satellite components, systems, parts, and technical data, provided that the export is confirmed to an approved list of foreign aerospace firms located within the territories of U.S. allies for use in an approved commercial communications satellite program.

B. COMMERCE DEPARTMENT REGULATIONS

The Export Administration Regulations (“EAR”), promulgated under the authority of the Export Administration Act (“EAA”),¹¹ are generally focused on the control of exports of “dual-use” commodities (i.e., commodities that have both military and commercial applications). The Department of Commerce administers the controls on such commodities through the Bureau of Export Administration (“BXA”).

The EAR subject controlled commodities identified in the Commerce Control List (“CCL”)—such as telecommunications equipment, encryption products, and high-speed computer equipment—to certain licensing requirements. The EAR also prohibit exports to embargoed countries and transactions involving parties that have been denied export privileges by the U.S. government.

The precursor to the principal U.S. export control legislation was the 1949 Export Control Act. That statute was addressed as much to protecting the domestic economy from post-war scarcity as to the national security implications of exports of military significance. Soon after the passage of this legislation, the NATO allies established a mechanism, which came to be known as CoCom (for Coordinating Committee), designed to prevent resources for reconstructing Europe from being diverted to the East and to counter the perceived Soviet military threat. Of comparable long-term significance was President Truman’s decision to use the 1917 Trading With The Enemy Act (“TWEA”) to cut off trade with China and North Korea at the time Chinese forces entered the Korean conflict.

¹⁰ FY 1999 National Defense Authorization Act, Public Law 105-261, § 1513(a), 112 Stat. 2174 (1998).

¹¹ The EAA, 50 U.S.C. app. §§ 2401-2420, expired in 1994. The EAR have since been maintained by Presidential order under the International Emergency Economic Powers Act. 50 U.S.C. §§ 1701-1706; Executive Order No. 12924, August 19, 1994. It appears that the pending efforts to renew the Export Administration Act, S.1712, will not be approved by the 106th Congress.

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The contemporary version of the EAR follows the pattern that was established at the height of the Cold War. The EAR use the successors to the Export Control Act as authority for the Commerce Department to screen and selectively license the exportation of certain dual-use products, with a view to maintaining superiority in security-related technology. At the same time, the EAR use TWEA and the related 1977 International Emergency Economic Powers Act (“IEEPA”) as the authority for Commerce and other agencies to implement embargoes (and partial embargoes) on trade with specific countries. The foreign policy interests underlying the latter type of restrictions include opposition to terrorism, organized crime, and narcotrafficking, as well as support for democracy, human rights, and environmental stewardship. Regulations issued pursuant to the President’s Enhanced Proliferation Control Initiative (“EPCI”) in 1991 place significant emphasis on the end-use or end-user of exported items.

Activities subject to the EAR include: (1) exports; (2) re-exports (e.g., after the product or technology is exported, it is then “re-exported” to a third country); (3) trade in foreign products that are the “direct product” of exported U.S. products or technology (e.g., products that are manufactured in a foreign country, but are based in large part on an exported U.S. product or technology); and (4) release of technology or source code to foreign nationals working in the United States (the “deemed export” rule) or foreign employees of a U.S. firm working abroad. The EAR do not regulate (1) exports under the exclusive jurisdiction of another federal agency or (2) exports of “publicly available” software and technology related to export controlled products (i.e., software or technology available to the public).

Unless a specific license exception applies, a company desiring to engage in an activity subject to the EAR involving a controlled commodity must first obtain a license from the Commerce Department. License applications submitted to the Commerce Department are reviewed by, at a minimum, the Departments of Commerce, State, Defense, and Energy.¹² In addition, the Office of Export Enforcement (“OEE”)—an office within BXA whose primary mission is the investigation and interdiction of illegal transactions—reviews a significant percentage of the export license applications submitted to BXA to assess diversion risks, identify potential violations, and determine the reliability of proposed end-users of controlled U.S.-origin commodities or technical data.¹³

A license application may be (1) approved; (2) denied; or (3) returned without action. As with license applications to State, the approval may be limited in scope by provisos appended by the reviewing agencies. The Commerce Department considers numerous factors in making a licensing determination, among which are national security, foreign policy, and impact on U.S. commercial interests.¹⁴

¹² GAO Report, p.3.

¹³ Report from the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction (1999) (“Weapons of Mass Destruction Report”), Annex, pp. 84-85.

¹⁴ GAO Report, p.2. The EAA contains numerous requirements for Department of Commerce adjudication of export license requests. Many others have been added as a consequence of case-specific agreement with the Department of State, while still other requirements are imposed by

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In Fiscal Year 1999, BXA received 12,595 export license applications. Of these, 9,311 were approved; 1,160 were denied; and 2,124 were returned without action.¹⁵ Commerce Department personnel advised the Task Force that in Fiscal Year 1999, BXA had approximately 45 employees actually engaged in processing license applications. However, Commerce Department personnel also advised the Task Force that these duties comprise only approximately 20-30 percent of their job requirements. These employees also perform a variety of other tasks including outreach, classifications, license exceptions, negotiations, and interagency work.

C. FOREIGN ASSETS CONTROL REGULATIONS

The United States Department of Treasury, through the Office of Foreign Assets Control (“OFAC”), administers both comprehensive and partial embargoes against several foreign countries. This regulatory activity is authorized by the TWEA and IEEPA, as well as the executive orders issued pursuant to these statutes. These regulations indicate which types of transactions are permissible, which are prohibited, and which require authorization. In addition, the OFAC regulations contain restrictions applicable to all countries, organizations, and individuals on certain lists (e.g., Blocked Persons list). In total, these lists contain more than 30,000 entities and individuals.

D. CUSTOMS REGULATIONS

The United States Customs Service (Department of the Treasury) administers U.S. tariff and trade laws and enforces the laws and regulations pertaining to exports and imports of controlled substances, materials, technology and goods. The Customs regulations implement the Tariff Act of 1930, the Trade Agreements Act of 1979, the North American Free Trade Agreement Implementation Act and Customs Modernization Act (1993), and the Uruguay Round Agreements Act (1994). In addition to its duties regarding permanent imports into the United States, the Customs Service enforces the regulations of the State Department, Commerce Department and OFAC, among others, concerning exports.

E. OVERALL POLICY CONTEXT

Historically, U.S. export control policy has reflected the difficulties inherent in finding an appropriate balance between the need to guard U.S. national security interests and the need to promote and protect U.S. commercial interests in the international marketplace. In the aftermath of the Cold War, both the national security and commercial environments are changing in ways that significantly impact U.S. export control policy. The information explosion, commercialization and globalization present policymakers with new and formidable challenges in their efforts to design and implement effective export controls. The changing public policy environment makes it essential for companies to develop compliance-centered export control systems, which will enhance both national security and government-industry relations.

Company export compliance personnel must realize that the U.S. government has multiple interests to balance in the export control field. There is a trade-off between the degree of precision of language in the regulations, on the one hand, and the flexibility to use export controls as a tool of national security and foreign policy on the other. Interpreting and applying

statute (e.g., the statutory provision for consideration of “foreign availability” in licensing decisions).

¹⁵ Washington Tariff & Trade Letter, Vol. 20 No. 5 (Jan. 31, 2000).

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the export laws can be difficult because some terms in the regulations are undefined or ill-defined. The application of some definitions to particular information requires judgment calls of technological and legal complexity. For example, it is especially challenging for companies to know when furnishing public domain information to a foreign person ceases to be an allowable, unlicensed communication and, crossing a significant legal line, becomes “assistance” for which a license is required. (“Assistance” is an important, but undefined term in the export control regulations.) Therefore, companies need to develop means to reach necessary judgments while effectively operating in a fast-paced, competitive business environment.

The Task Force was not chartered, nor has it undertaken, to critique existing export control laws or address what the government should or should not be doing in the area of export control policy. During the course of this project, however, Senator Nunn and Ambassador Wolfowitz have identified concerns with the existing export laws and questions about the future course of U.S. export control policy, which they will make known independently from this report.

IV. INDUSTRY “BEST PRACTICES” RELATED TO 12 KEY AREAS OF EXPORT COMPLIANCE

The Task Force has reviewed various industry practices regarding export compliance and has developed a “best practices” standard for complying with the letter and spirit of U.S. export control laws and regulations related to 12 key areas: ¹⁶

- Management Commitment;
- Compliance Council;
- Compliance Personnel;
- Instruction Manuals;
- Intranet Site;
- Training and Education;
- License Application Process;
- Implementing License Authorizations;
- Handling Foreign National Issues;
- Recordkeeping;
- Audits; and
- Handling Suspected Violations

As explained above, the term “best practices” refers to those practices that generally should be incorporated into an export compliance program to maximize its effectiveness. These standards cannot be mechanically or rigidly applied, however, because companies throughout the industry vary greatly in the nature and scope of their export issues. Thus, the presence of any specific practice does not necessarily guarantee an effective compliance program, nor does the absence of a specific practice necessarily indicate an ineffective program. The application of these standards must be tailored to each company to produce the most effective compliance system.

¹⁶ A chart summarizing the best practices regarding these 12 areas is attached as Appendix A.

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A. MANAGEMENT COMMITMENT

Virtually all industry representatives and government personnel interviewed by the Task Force agreed that senior management commitment to export compliance is the single most important aspect of an effective export compliance program. A strong and unquestioned commitment from senior management is necessary for a company to effectively develop and implement a “best practices” standard in any of the 12 key areas of export compliance listed below.

A “best practices” standard for management commitment can be divided into four areas:

- Communicating the commitment;
- Being actively involved in export compliance;
- Providing resources to develop and implement the program; and
- Evaluating and ensuring effectiveness of the program

1. Communicating the Commitment

Senior management must effectively communicate its strong and unyielding commitment to export compliance in a written policy statement to all employees and then take every reasonably available opportunity to reiterate the importance of export compliance. This message must be emphatic and pervasive throughout the company.

The policy statement should be written, clear and concise, formatted consistently with other priority management policy statements, and signed by senior management. The statement should affirm the company’s commitment to export compliance, explain the basic purpose of export controls, direct employees to comply with export laws and regulations, state the potential penalties for non-compliance to include termination and imprisonment, and identify individuals to contact for further information. Every company interviewed by the Task Force has some policy statement or directive to this effect.

Senior management must also place constant emphasis on export compliance and take every reasonably available opportunity to reiterate the importance of compliance. These opportunities include staff meetings, training sessions, company communications, press releases, and business meetings. Senior management should communicate these messages to all employees, but should focus on those involved in export functions, auditors and others involved in export compliance. Senior management should also periodically reissue its policy statements regarding export compliance to reaffirm the company’s commitment and to appropriately reflect management personnel changes.

Senior management should promote several themes in these communications, most importantly that export compliance is vital to protect the interests of national security. By explaining the public policy considerations underlying export control laws and regulations, management can stress to employees that unauthorized transfers of even low-level technology can potentially jeopardize national security or further the development of weapons of mass destruction. Management should communicate possible defense applications or dual-use risks of the company’s products in clear, non-regulatory terms.

Senior management should also emphasize that export compliance is good for business and can enhance communications between the company and government regulators. Export

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compliance is consistent with a company's overall compliance responsibilities and helps avoid penalties that hurt not only the individual offender but the company as well. For example, a company that "willfully" or "knowingly" violates the Export Administration Act is potentially subject to a \$1,000,000 fine or five times the value of the export, whichever is greater, per violation. An employee committing the same violation is potentially subject to a \$250,000 fine and ten years imprisonment, per violation. In addition to potentially irreparable damage to the company's reputation, the company and its employees may be denied export privileges (i.e., the company or its subsidiaries would not be permitted to export or receive exports of U.S.-origin products or technology). The employee can also, of course, be terminated or otherwise disciplined by the company.

Senior management must stress that compliance is more important than any sale. Some business personnel may improperly adhere to the view that export laws and regulations should be obeyed only until the point that the sale will be lost. Management must succeed in convincing these personnel, through both words and actions, that sales should not be pursued at the expense of export compliance.

Senior management should also communicate that export compliance is a system—a total company-wide program—and that each employee has a part in ensuring the integrity of the system. Employees must understand the "big picture" and realize that if they personally do not perform according to written procedures, they can become the weak link that can bring down the system.

2. Being Actively Involved in Export Compliance

Senior management must become actively involved in export compliance functions and assume responsibility for export compliance. Management must understand when and how export laws and regulations affect the company and the corporate internal controls that have been implemented to ensure compliance with these laws and regulations.

One way for management to become actively involved in export compliance functions is through an export compliance council that meets regularly. This council, which should include senior corporate personnel and business unit personnel, can serve a critical function in overseeing a company's export compliance program. Effective use of a compliance council is explained more fully in section IV.B below.

The degree of senior management commitment is potentially correlated with the degree of involvement by the Board of Directors. Most companies interviewed by the Task Force did not have a Board committee to specifically oversee export compliance functions. More commonly, the Board became involved only if negative audit findings were reported to the Audit Committee or the export compliance council raised an issue to the Executive Committee or Audit Committee. Nevertheless, one way for a company to sustain a strong and very visible management commitment is to give a Board committee process-level oversight of export compliance functions, similar to the Audit Committee's oversight of financial matters. This oversight function could be performed by the Executive Committee, Operations Committee, Compliance Committee, Audit Committee, or other committee as appropriate.¹⁷

¹⁷ A company may consider using a committee other than the Audit Committee given the Audit Committee's significant oversight responsibilities of corporate financial matters and its increased

3. Providing Resources to Develop and Implement the Program

Senior management must also provide sufficient resources—time, money and personnel—to develop and implement the company’s export compliance program. Effective compliance, however, often reflects the efficiency of the application of resources more than its magnitude. Thus, there is no specific resources test that is sufficient to establish a presumption of export compliance. Rather, the pertinent test is whether or not there are sufficient resources made available to implement the export compliance process a company has established.

Management should provide incentives to recruit, train, and motivate quality export compliance personnel and should structure paycales, bonuses, evaluations, and/or promotions accordingly. Export compliance positions should have sufficient authority and discretion vested in them to garner the necessary respect to ensure compliance. “Best practices” standards regarding export compliance personnel are discussed more fully in section IV.C below.

As an obvious corollary, management must provide these individuals the compliance tools necessary to perform their jobs. These tools include export compliance manuals (discussed in section IV.D), intranet sites (discussed in section IV.E), and training and education (discussed in section IV.F). Furthermore, management must dedicate sufficient resources to the license application process (discussed in section IV.G), implementing license authorizations and provisos (discussed in section IV.H), handling foreign national issues (discussed in section IV.I), and recordkeeping (discussed in section IV.J).

Management must continuously revisit these resource allocation issues to ensure that export compliance obligations are met.

4. Evaluating and Ensuring the Effectiveness of the Program

Senior management must also take an active role in evaluating and ensuring the effectiveness of the export compliance program.

First, management must direct that audits of export compliance functions be conducted. Management should include internal and external reviews of both export compliance programs and operational practices in order to actively monitor export functions. “Best practices” standards regarding audits are discussed more fully in section IV.K below.

Second, management must encourage employees to report suspected violations and develop appropriate avenues and procedures for handling such reports.

Third, management must consistently enforce compliance standards. Those who violate U.S. export laws and regulations—or the company’s export policies and procedures—should be subject to appropriate administrative and financial penalties.

Fourth, in addition to disciplinary actions, management should also take whatever other action may be needed, including modification of the compliance program, to prevent and detect violations in the future. “Best practices” standards regarding reporting suspected violations, imposing discipline, and taking corrective actions are discussed more fully in section IV.L below.

responsibilities regarding corporate independence matters. See Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees.

Finally, management should require others—including outside consultants, advisors, independent contractors, foreign distributors, agents, sales representatives, joint venture partners, and similar parties—to comply with the company’s compliance program as a condition of the company conducting business with them. Relations with supplier firms should include an understanding of the effectiveness of their export control activities in circumstances where the company transfers export controlled technical data to its suppliers.

B. COMPLIANCE COUNCIL

An export compliance council serves a critical function in overseeing a company’s export compliance program and implementing management’s export compliance objectives. Several companies in the industry have instituted “compliance councils” that focus on export compliance. Further, under certain circumstances, the National Industrial Security Program Operating Manual (“NISPOM”)¹⁸ requires the establishment of a Government Security Committee (“GSC”) comprised of senior management and certain Board members. The establishment of a GSC is now required only of foreign owned, controlled, or influenced (“FOCI”) firms. It is used as a mitigating measure by the DOD to address the increased technology transfer risk associated with foreign ownership. The GSC has been found to be a very effective way of protecting U.S. security interests. Its key feature—Board level monitoring of compliance—creates a useful “template” for non-FOCI firms to use concerning Board involvement. A GSC, among other duties, takes the necessary steps to ensure that the company complies with U.S. export control laws and regulations.

A “best practices” compliance council has six basic elements:

- Chaired by a senior executive;
- Members include senior export personnel at corporate and business unit levels;
- Meets at least quarterly;
- Creates “working groups” as needed;
- Creates appropriate records; and
- Reports to Board of Directors (or committee thereof)

1. Chaired by a Senior Executive

First, the council should be chaired by a senior executive. This appropriately vests control of the council with senior management and provides the necessary profile for the council to perform its assigned task of overseeing the export compliance program.

¹⁸ The NISPOM prescribes requirements, restrictions, and other safeguards that are necessary to prevent unauthorized disclosure of classified information and to control authorized disclosure of classified information released by U.S. government executive branch departments and agencies to their contractors. Although the NISPOM concerns classified information, many of its requirements concerning safeguards and internal controls can be logically adapted for use in export control compliance programs.

2. Includes Appropriate Personnel

Second, the council should include senior corporate personnel and business unit personnel involved in export compliance, such as:

- General counsel;
- Auditor;
- Ethics counsel;
- Individual responsible for Foreign Corrupt Practices Act issues;
- Functional manager for export compliance;
- Representatives from all business units with export compliance issues;
- Sales manager representative; and
- Information technology manager

Appropriate council membership ensures that the council can effectively disseminate export compliance information, set company export compliance policy, and handle larger export issues.

3. Meets at Least Quarterly

Third, the entire council should meet at least quarterly to discuss strategic export compliance issues. Meetings at least quarterly are necessary to provide the consistency and communication required to be an effective resource for company management and meet the company's compliance responsibilities. Most companies' compliance councils meet at least quarterly.

4. Creates Working Groups as Needed

Fourth, the council should appoint members to export compliance "working groups" comprised of individuals with expertise in export laws and regulations and access to necessary U.S. government resources. Working groups should meet on an as-needed basis to discuss practical applications of U.S. export laws and resolve export issues not requiring the attention of the council. Several companies in the industry have created ad hoc working groups to address day-to-day export issues.

5. Creates Appropriate Records

Fifth, the council and the working groups should create appropriate records of meetings—such as minutes or reports—to promote consistency and communication. These records should be distributed to council and working group members and affected employees.

6. Reports to Board of Directors

Finally, the council should report directly to the Board of Directors—or a committee thereof—no less than annually on the state of the export compliance program and the status of outstanding export compliance issues. A report to the Board immediately emphasizes the importance of export compliance to the highest levels of the company. Further, as noted above, Board members have a personal stake in ensuring export compliance throughout the company and avoiding potential criminal and civil sanctions. The Audit Committee, the Executive Committee, or other committee as appropriate, should be responsible for reviewing the report.

C. EXPORT COMPLIANCE PERSONNEL

An export compliance program is only as good as the personnel who implement that program. Accordingly, a company must ensure that it dedicates sufficient resources to export compliance functions.

A “best practices” standard for evaluating export compliance personnel includes three elements:

- Compliance personnel must be of sufficient quantity to perform critical functions;
- Compliance personnel must be of sufficient quality to ensure competent performance; and
- Compliance personnel must be in the proper location to effectively implement export objectives

1. Quantity of Personnel

First, management must ensure that a sufficient number of personnel are dedicated to export compliance functions, especially in critical areas such as technical reviews, license applications, license implementation, internal security procedures, audits, counsel, program security manager, and central export manager.

In addition, management must designate knowledgeable back-up personnel that can maintain the compliance structure in the temporary absence of key persons.

2. Quality of Personnel

Second, although not yet widely implemented, companies recognize the need to develop plans to increase the desirability of export compliance positions. Historically, export personnel have often not been viewed as the “superstars” of companies. As a result, some highly qualified personnel avoid export compliance positions in favor of more attractive ones. To combat this potential problem, export compliance positions should be viewed as a positive career development at the company, and not merely administrative or clerical in nature. Management should provide incentives to recruit, train, and motivate quality export compliance personnel and should structure payscales, bonuses, evaluations, and/or promotions accordingly.

Export compliance positions should have sufficient authority and discretion vested in them to garner the necessary respect to ensure compliance. As an obvious corollary, management must provide these individuals with adequate training and the compliance tools necessary to perform their jobs.

Management should exercise due care to avoid delegating substantial discretionary authority in this area to individuals with a history of past compliance violations.¹⁹

3. Location of Personnel

Third, in order to avoid potential conflicts of interest, export compliance officers at the business unit level should generally be positioned in the company so their sources of salary, bonuses, and evaluations are separate from the businesses they monitor. Similarly, export compliance personnel must be positioned at the appropriate levels in the organizational structure

¹⁹ U.S. Sentencing Commission, Guidelines Manual, § 8A.1.2., cmt.

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to enforce export compliance in the face of other potentially conflicting business pressures. Frequently, tension exists between business personnel (e.g., marketers, program managers) and export compliance personnel. Further, business personnel, as the source of revenue for the company, may have stronger roles in companies than export compliance personnel. These potential conflicts of interest are generally less acute at the corporate level.

Many companies have attempted to ensure the independence of their export compliance personnel at the business unit level by placing them in—or making them report directly to—the general counsel’s office. Several companies told the Task Force that this arrangement was effective. Several government officials have also endorsed this compliance structure and recent consent decrees entered into by the government to resolve export violations have included a provision requiring oversight and responsibility by the general counsel’s office.

The general counsel is one of several corporate executives in whom export compliance responsibility might be appropriately placed, depending on the structure and size of the organization and its past history with compliance issues. At the corporate level, for example, it may be more effective to place export compliance responsibility with corporate executives who exercise greater control over the business unit operations or who have greater ability to make necessary changes to the company’s export compliance program.

Some companies may choose to centralize the responsibilities for export compliance in a few individuals. Other companies may decentralize export control responsibilities but exercise sufficient corporate oversight to ensure compliance.

In any event, organizational charts should be created that clearly describe the authority, function and duties of key persons in the day-to-day export operations and compliance efforts of the company. These organizational charts should be consistently updated to reflect personnel changes. Similarly, contact lists should be created that identify the name, title, phone number or other pertinent contact information for all primary and backup export compliance personnel. These organizational charts and contact lists should be widely distributed throughout the company.

Finally, management must be aware of potential export compliance vulnerabilities during company transitions such as mergers, layoffs, and other legal reorganizations and ensure that export compliance personnel are of appropriate quantity and quality, and at the appropriate location, during those times as well.

D. EXPORT COMPLIANCE INSTRUCTION MANUALS

Every company interviewed by the Task Force has developed a corporate export compliance instruction manual. These manuals are necessary tools to educate employees about export compliance programs.

A “best practices” standard for evaluating export compliance instruction manuals contains three elements:

- Appropriate content;
- Wide distribution; and
- Update mechanism

1. Content

An export compliance instruction manual will contain appropriate content such as:

- Summaries of applicable export laws and regulations;
- Charts or diagrams showing the corporate compliance structure;
- Policies and procedures regarding export compliance;
- Product classification and product/license matrices;
- Business operations and licensing process flow charts;
- Sample forms, instructions and agreements;
- Contact list of important export compliance employees; and
- Lists of other export compliance resources

Business units within a company should also develop and maintain their own compliance instruction manuals tailored to their business operations and compliance program. Either the corporate office or the business unit can provide, as needed, supplemental materials such as deskbooks and bulletins.

The policies and procedures contained in the manuals should address all the key elements of an export compliance program, including:

- License application process for Commerce Department and State Department;
- Implementing license authorizations;
- Screening of parties, countries, and activities against relevant government lists;
- Recordkeeping;
- Training;
- Audits;
- Notification requirements; and
- Reporting violations

2. Distribution

Instruction manuals should be clearly written, widely distributed and easily accessible. Most companies interviewed by the Task Force distribute their compliance materials to all employees via the intranet, or at least provide hard copies to those significantly involved in export compliance.

3. Update Mechanisms

In addition, manuals should be frequently reviewed and updated as necessary. Each company interviewed by the Task Force has designated someone from the export compliance office to update the manual. Manuals should be formally reviewed, whether required for legal changes or not, on a recurring basis. Several companies conduct these reviews quarterly. In the interim, notice of changes in legal requirements, policy, and procedures should be distributed, as necessary, to employees.

E. EXPORT COMPLIANCE INTRANET SITE

Computer usage, particularly in technical arenas like the satellite industry, has become ubiquitous. Therefore, use of the intranet as a tool to promote and enforce export compliance is a necessary component of a “best practices” system and every company interviewed by the Task Force has developed an export compliance intranet site.

A “best practices” intranet site has six basic features:

- Appropriate content regarding export compliance with related links;
- Interactive training system to test export compliance comprehension;
- “Ask questions” section for employees;
- Update mechanisms;
- Effective encouragement to use the site; and
- Computer security

1. Content

First, the intranet site should contain appropriate content regarding export compliance, to include:

- Corporate policies regarding export compliance;
- Business unit export compliance procedures;
- List of all current licenses, provisos, and agreements;
- License exception parameters;
- Lists of restricted/embargoed/sanctioned countries, companies, and individuals;
- Important forms which can be downloaded and printed such as DTRA notification forms and license questionnaires;
- Contact list of important export compliance employees;
- Links to federal agency web sites such as the State Department and Commerce Department;
- Procedures for reporting export compliance issues and concerns;
- Summaries of pertinent export regulations; and
- Federal Register notices

2. Interactive Training System

Second, the intranet site should have an interactive training system to test export compliance comprehension. As discussed in section IV.F.8 below, employees involved in export compliance should be required to complete this training as part of their job certification.

3. Interactive Feedback Mechanism

Third, an effective intranet site should contain an “Ask questions” section where employees can e-mail the export compliance office (or its equivalent) with export-related questions, which are answered in a timely fashion. The company should ensure that questions that directly affect the implementation or interpretation of licenses, laws, or regulations are reviewed by someone from the legal department.

4. Update Mechanisms

Fourth, the intranet site should also have appropriate update mechanisms to ensure that government regulations and corporate and business units policies, procedures, forms, contact lists, and other material are kept current. In most companies interviewed by the Task Force, the export compliance office is responsible for these updates.

5. Effective Encouragement to Use Site

Fifth, an effective marketing campaign must be implemented so that employees are aware of the system, encouraged to use it, and informed how it works. As part of this effort, the intranet system should record the number of hits on the site and the number of times the “Ask questions” area is used.

6. Computer Security

Sixth, a computer security system should be installed to ensure that only eligible employees are allowed unlimited access to the site if the site contains proprietary or export-controlled data, such as licenses or program technical data. All employees, including foreign national employees, should have access to the non-proprietary and uncontrolled data—such as policies, procedures, and contact information—to maximize awareness of the export compliance program. Companies should also carefully control access to other possible computerized sources of controlled data, such as operational databases.

The increase in the number of electronic pathways for the transfer of export-controlled information, made possible by rapid advances in computation and telecommunications technology, has increased exposure to compliance risks. Thus, a company must construct and support a disciplined process of managing export-control compliant communication in all forms, including networked computers (both Intranet and Internet), Usenet, and electronic mail. The computer software industry has developed a number of software tools to assist corporations in managing their computer resources. These tools help diminish the risk that corporate computer resources will be used in a manner inconsistent with established policies, whether this involves accessing inappropriate network addresses, or using computer resources for inappropriate reasons.

F. TRAINING AND EDUCATION

Companies and export compliance experts agree that training is the foundation of any successful export compliance program. Substantively informed employees minimize the likelihood that inadvertent violations of the law will occur. Those industry representatives interviewed by the Task Force believe that the greatest risk of non-compliance with export laws and regulations occurs during casual conversations in person, on the telephone or via e-mail. Most industry representatives also agree that the best way to prevent these types of violations is through heightened awareness and training.

A “best practices” standard for export compliance training has eleven basic features:

- Compliance council oversees export compliance training;
- Training is conducted by export compliance personnel;
- Top level briefings are provided to the Board of Directors (or appropriate committee thereof);
- Top level training is provided to senior management;
- Introductory awareness training is provided to all employees;
- Intermediate training is provided to all employees involved in export compliance;
- Advanced training is provided to key export compliance personnel;
- Comprehension tests are administered to those regularly involved in export compliance;
- Refresher and update training are provided as necessary;
- Training records are maintained; and
- Special emphasis is placed on training in high-risk areas

1. Training Responsibility

First, the export compliance council—or a working group of the council—should oversee export compliance training. The council, consisting of senior corporate management, is ideally situated to ensure that necessary training is accomplished. The council can also ensure the most efficient use is made of cross-functional areas such as ethics, security, audits, and operations. Training materials should be developed as a collaborative effort by functional export compliance personnel, licensing personnel, technical personnel, counsel, and, if appropriate, outside counsel.

2. Conducted by Export Compliance Personnel

Second, training should generally be conducted by qualified export compliance personnel. This will ensure that the training is conducted properly and consistently. As trainers, export compliance personnel will also increase their visibility. A “best practices” model, however, does not require that one individual or office be responsible for training all employees. Several companies have effectively implemented a “cascading” model of training whereby outside counsel or the export compliance office initially trains employees heavily involved in export issues such as empowered officials and export coordinators. These employees, in turn, train other employees who are less involved in export issues. Advantages of this “cascading” or “train the trainer” system include increased comprehension level for those required to train and decreased training burden on the senior export compliance personnel.

3. Top Level Briefings (Board of Directors)

Top level briefings should be provided to the Board of Directors (or appropriate committee thereof). These briefings should make the Board aware of export issues, explain Board members' fiduciary responsibilities to ensure compliance, explain potential liabilities for non-compliance, and provide an overview of the company's export compliance structure and process.

4. Top Level Training (Senior Management)

Top level training should also be provided to senior management. This training should cover the same basic topics as the briefings to the Board, but in greater detail to reflect senior management's increased role in export compliance.

5. Introductory Training (All Employees)

Fifth, nearly every company interviewed by the Task Force provided some type of introductory training on export issues for all new employees.²⁰ Companies have accomplished this introductory training in a variety of ways, by having employees undertake such tasks as:

- Attending a workshop where export issues are discussed;
- Watching a video describing export compliance;
- Reading a pamphlet on export compliance; or
- Logging on to the company's intranet system with an interactive export compliance program

The introductory awareness training should generally explain:

- What an export is;
- The national security concerns underlying export compliance;
- How the company's products relate to those underlying concerns;
- How exports are approved;
- When exports are denied;
- How a violation occurs;
- The company-specific "red flags" for potential export violations;
- The importance of each employee to the overall compliance system;
- The severe consequences for both the company and the individual employee if an export violation occurs;
- The identities of responsible export officials who should be contacted if export issues arise;
- Employees' reporting obligations and requirements; and
- Identification of high-risk areas

6. Intermediate Training (Employees Dealing with Export Issues)

Sixth, every company the Task Force interviewed also provided intermediate training to those employees who regularly deal with export issues (including those in departments such as traffic, marketing, contracts, security, legal, public relations, and engineering). This training

²⁰ Similarly, the NISPOM suggests that employees should receive initial security briefings consisting of a threat awareness briefing and a defensive security briefing.

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should be tailored to the specific job functions of the attendees but should include in the curriculum, at a minimum:

- Overview of the purpose and scope of export controls;
- Various license types and requirements;
- New customer review procedures;
- Requirements for entering into contractual relationships;
- Marketing abroad;
- Technical exchanges through telephone, facsimile, electronic mail or in person;
- Recordkeeping requirements;
- Requirements for international travel with products or technical data;
- Screening procedures; and
- Possible administrative, civil and criminal penalties for export violations

Some companies have also effectively tailored their training programs for those program employees working with technical data. Export control laws and regulations, and the licenses, agreements and provisos issued pursuant to these laws and regulations, are often difficult for employees with a technical background to understand. It is vital that trainers “bridge the gap” between the legal language contained in the regulations and licenses and the technical language that is familiar to the program workers. Examples and hypothetical cases with questions and answers can be used effectively to accomplish this training.

7. Advanced Training (Export Compliance Personnel)

Seventh, all companies interviewed by the Task Force provide advanced training for trainers and employees who frequently deal with export compliance issues such as empowered officials. Companies often require these employees to attend formal, sit-down classroom sessions or in-house conferences for two to three days per year. In addition, these individuals are required to attend outside export compliance training conferences, which will ensure these employees remain abreast of current regulatory requirements and industry practices. Attendance at these conferences also maintains relationships throughout the industry so employees can learn from other companies.

8. Comprehension Tests

Eighth, employees who regularly handle export issues should be tested for basic comprehension of export issues. Some companies have incorporated this comprehension testing by interactive video and laserdisc. Others are developing interactive training modules available via their intranet sites. Those companies that have incorporated comprehension testing typically have no more than 20 questions that must be correctly answered before an employee is certified as having completed that training module.

Companies can also improve employee comprehension by effectively incorporating hypotheticals, scenarios, and guidelines into all phases of training.

9. Refresher and Update Training

Ninth, a best practices training program will incorporate frequent refresher and update training as necessary. The frequency and format of the refresher training will vary depending on the employees’ responsibilities and nature of the export issues involved, but formal update

training should generally occur no less than annually. In addition, memoranda, newsletters, or e-mails should be sent periodically to all employees reaffirming the company's export requirements and advising employees of any changes to export regulations or the company's policies or procedures. Some companies also use other means to heighten employees' awareness of export issues such as printing and distributing export slogans on posters, billboards, coffee mugs, and computer mousepads.

10. Training Records

Tenth, companies should maintain detailed records of the training programs offered and employee participation in them. Training records should generally be maintained in personnel files to ensure that training is appropriately reflected in job certifications, pay raises, bonuses, and/or performance evaluations.

11. Special Emphasis on High-Risk Areas

Finally, companies should focus training efforts on high-risk areas for non-compliance. This emphasis can be achieved in a variety of ways, such as more in-depth training, more frequent training, and use of hypotheticals, scenarios, and guidelines to heighten general awareness of export issues and provide practical export compliance guidance to employees. Most companies interviewed by the Task Force have included hypotheticals in virtually all forms of training and education material, such as a new employee training video; export compliance manuals; export compliance pamphlets; and company newsletters. Most companies have also developed general guidelines and decision flow charts to help explain the licensing process, and have created more specific flow charts and guidelines to provide practical guidance in company- or product-specific export situations.

G. LICENSE APPLICATION PROCESS

The license application process is a critical stage in an export compliance program for several reasons. A company that successfully manages the license application process can more effectively determine which products require license approvals, improve the quality of the license application, reduce the impact of licensing timelines on business operations, and increase overall compliance. In doing so, a company will also be laying the foundation for improved commercial performance.

A "best practices" license application process incorporates eight basic features:

- Procedures for identifying licensing requirements;
- Planning for license requirements;
- Standardized license applications;
- Automated license processes;
- Procedures for screening against relevant government lists;
- Multiple layers of review, with one central liaison for government submissions;
- More focused licensing controls for high-risk areas; and
- Positive relationship with U.S. government agencies

1. Identifying License Requirements

First, most companies interviewed by the Task Force have implemented guidelines for qualified personnel to identify licensing requirements based on jurisdiction, classification of products and/or proposed end-users and end-use. It is critical that these personnel consider all potential restrictions from various sources (e.g., State Department, Commerce Department, Treasury Department, Defense Department). Companies must also develop specific procedures for determining whether a license or proviso applies in a particular situation. One good rule of thumb is that all employees should assume that every potential export requires a license. Thus, employees and, when necessary, export compliance personnel will be required to make informed assessments before sending out any item or piece of information. This operating assumption is especially crucial in high-risk areas where classification can be elusive—such as providing “technical data” or a “defense service.”

Further, in order to effectively identify and resolve license requirements, companies must ensure that potential export issues default to experienced export personnel. In addition, companies should institute a process to handle occasions where employees disagree regarding export issues or cannot decide whether a license is necessary. In this process, licensing questions are efficiently moved up the corporate chain and, if necessary, sent to the government in order to resolve a licensing question. The precise mechanism for such internal appeals will depend on the company’s structure and the nature of the disagreement—e.g., over which licensing mechanisms apply; over whether export controls apply; or whether certain exemptions apply. In any case, each step should be documented providing a written record of the entire decision-making process. This written record forces employees to justify their decisions, ensures accountability, and provides a clear trail of events if a decision by the company is later questioned.

After qualified personnel identify licensing requirements, compliance personnel should create product classification, product/license, or product/country matrices as appropriate for future reference. The company may also consider developing a technology matrix similar to the more common product/license matrices. Similarly, export compliance personnel should catalog and communicate license exception parameters and other licensing issues as appropriate.

2. Planning for License Requirements

Second, companies should plan in advance for license requirements. Some industry representatives complained about potentially lengthy delays in the license application process, particularly with the State Department. Therefore, a company must make efforts to educate its employees in all functional areas—such as marketing, sales, customer relations, contracts, program management, and insurance—of these potential delays so that licensing issues can be successfully managed and incorporated with all other program deadlines and timetables.

At least one expert has said the key to the licensing process is understanding the strategic nature of the licensing process. Basically, one needs to understand exactly what the program personnel want to achieve during the program or project to avoid inefficient, insufficient or incorrect licensing. This requires close interaction between members of the export compliance office and program and project personnel. In addition, an effective license application process utilizes detailed questionnaires to gather necessary information required for a license.

Companies should also have a system for keeping track of when licenses expire and the rate at which the dollar or unit value of licenses is being utilized. One reason for “emergencies”

is that companies discover the need for license renewals or amendments so late that the normal licensing times at State and Defense are inadequate to respond. Thus, companies should plan for license renewals as they have to plan for long lead time hardware. This should be a dimension of planning for the management of export license compliance over the life-cycle of the license.

3. Standardized License Applications

Third, to the extent feasible, companies should standardize their license applications. Certain products and technology—such as marketing material, specifications, insurance information, and component parts—are exported on a recurring basis. Several companies interviewed by the Task Force have endeavored to create “standard” license applications for these recurring exports, thus minimizing the need for new and unique licenses, resulting in more complete applications, and reducing review time necessary by both company export compliance personnel and U.S. government authorities. However, this standardization must be focused and consistently reviewed to ensure that the company does not lapse into a dangerous “cookie cutter” mentality and overlook potential licensing issues.

4. Automated License Processes

Fourth, a “best practices” license application process will also be automated. Several companies in the industry have instituted or are in the process of instituting automated licensing systems. These automated systems accomplish several goals. Providing templates on an automated system potentially increases the efficiency, consistency, and quality of license applications. Automation also provides easy access to licenses, agreements and provisos by company employees and the government. Automation eases record-keeping requirements by keeping all information in a centralized database. Thus, automation improves the quality of the license application and potentially reduces the licensing processing time at the company and U.S. government.

Companies should also endeavor to blend export controls into the existing (and to be enhanced) automated systems that involve product sales and distributions. For example, automated shipping processes could require employees to enter all potentially relevant data (e.g., product description, product classification, end-user) into the system before printing shipping forms or authorizing shipments. Similarly, automated screening processes could be incorporated to ensure that every product/recipient is screened against relevant government export control lists such as the ones listed below.

5. Screening Procedures

Fifth, companies should develop and implement procedures for potential exports (e.g., customers, countries, carriers, employees, and visitors) against relevant government lists including:

- Embargoed Countries List;
- Denied Persons List;
- Entities List;
- Specially Designated Nationals and Blocked Persons List;
- Debarred and Suspended Parties List;
- Proscribed Missile Technology Lists;
- Proscribed Chemical & Biological Weapons List;
- Nuclear Non-Proliferation List;

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- Terrorism List Countries, Foreign Terrorist Organizations, and Specially Designated Terrorists;
- Prohibited end-uses and end-users;
- Prohibited military end-users;
- Anti-boycott List; and
- Specially Designated Narcotics Traffickers List

Screening information should be accessible and consistently used by all potentially relevant business unit functions such as marketing, human resources, security, shipping and receiving, contracts, purchasing, engineering, legal, and export compliance. Although it is possible to manually screen customers, computer software is available which immediately updates screening lists and provides quick, efficient, and thorough customer screening. Access to this screening information should supplement—not supplant—the involvement of export compliance personnel in the licensing process.

BXA publishes “Export Management System Guidelines” to assist companies develop and implement effective screening procedures.²¹ BXA, ODTIC, and Customs have also published a list of “Red Flags” and “Know Your Customer Guidelines” to assist company personnel in determining whether there is a risk that a product shipment will be sent or diverted to a user subject to special restrictions.

Finally, export compliance personnel should regularly review the Federal Register for notices, rules, and regulations that may impact exports. Automated compliance systems must be continually updated to reflect the latest changes in laws and regulations.

6. Multiple Layers of Review with One Central Liaison to U.S. Government

Sixth, a “best practices” license application process incorporates several layers of review. For example, the originator of the product or data should identify the activity or products involved and participate with export compliance personnel to initially determine which government agency has jurisdiction over the product, the product’s classification, whether a license is required, and whether a license exception or exemption applies. An individual with export licensing experience should conduct a similar review and assist in the application process. In the case of technical data, this individual should have technical and legal training or experience. Once completed, all license applications should be reviewed by a centralized manager for export compliance before submission to a government agency. This process will reduce the number of licensing errors, improve licensing consistency and enhance overall compliance efforts. All companies interviewed by the Task Force had a system to this effect.

Perhaps the most important feature of the review process is ensuring that export issues come to the attention of export compliance personnel in the first instance. Some companies and advisors to the Task Force indicated that the majority of export problems occur when export compliance personnel are not made aware of the potential export, and rarely occur once export personnel are involved. Therefore, companies should develop and implement procedures and guidelines to alert employees when they should consult with export licensing personnel.

²¹ <http://www.bxa.doc.gov/compliance/EMSGuidelines.html>.

7. More Focused Controls on High-Risk Areas

Seventh, a company should identify its high-risk areas for non-compliance and focus its licensing efforts on those areas. These high-risk areas will vary depending on the company’s business operations, but often include elusive issues involving ITAR-controlled “technical data” and “defense services.” Traditional defense products—such as firearms, missiles, and tanks—are more intuitively subject to export controls than, for example, technical data related to commercial communications satellites. A company may focus on these high-risk areas in a number of ways as described elsewhere in this report such as providing more thorough training and detailed guidance to relevant employees and subjecting those areas to heightened scrutiny from export compliance and audit personnel. A “911” type of system to address compliance issues that emerge in high-risk settings may also prove useful as means of providing authoritative and timely compliance guidelines to operating units in the field.

The company should also conduct a proactive review of its internal process—such as performing trend analysis on rejection rates or license processing times—to ensure that its license applications are being completed fully, accurately, and efficiently.

8. Positive Relationship with U.S. Government

Eighth, a company must foster and maintain a positive relationship with U.S. government export compliance personnel. Some companies have vowed to “treat the government as a customer” and made efforts to increase communications with and be more responsive to government personnel. Regardless of the specific approach employed, both the company and the U.S. government are potential beneficiaries of healthy dialogue designed to clarify export responsibilities and produce feedback on licensing and compliance issues. At many companies, this effort is spearheaded by a central liaison to the U.S. government. The company should also take advantage of any formalized liaison or outreach programs administered by the government, such as Project Gemini run by the U.S. Customs Service. Through Gemini, Customs cooperates with companies that manufacture controlled commodities to identify and prevent illegal export activities. Programs of this sort foster a positive cooperative relationship between government and industry.

H. IMPLEMENTING LICENSE AUTHORIZATIONS

Properly implementing licenses and provisos is just as important as obtaining the license itself. In fact, several companies and government sources indicated that companies are at greater risk of violating the export laws for failure to comply with provisos and limitations than for failure to obtain a necessary license.

A “best practices” standard for properly implementing licenses and provisos—particularly for ITAR-controlled products and information—has five basic features:

- Written license administration plans;
- Training of personnel;
- Export logs;
- Transmittal and acknowledgments of license conditions; and
- Self-assessments and monitoring

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1. Written License Administration Plans

First, companies should develop a written plan for the administration of each license or agreement. This plan should include, at a minimum:

- easily accessible and readily identifiable records of approved licenses and any limitations attached to those licenses; and
- timelines indicating periods of validity for each license authorization.

This plan should be prepared promptly upon receipt of any license or other authorization and disseminated throughout the relevant portions of the business unit.

2. Training Personnel

Second, companies should ensure that license authorization limitations are forwarded, discussed, and understood by the business unit personnel responsible for exporting under the authorizations. If necessary, the company should use technical personnel, in conjunction with appropriate in-house counsel or outside counsel support, to interpret the provisos and explain them to the responsible personnel. Employees working with a product or program should receive program-specific training from the export compliance office describing how the licenses, agreements, and provisos apply to practical situations at the program level. The responsible personnel should certify their understanding and the company should file these certificates with the license administration plans.

3. Maintaining Export Logs

Third, the company should maintain relevant product or technical data transfer logs or other methods of memorializing what transfers occurred under which authorizations.

4. Maintaining Transmittal and Acknowledgements of License Conditions

Fourth, the company should maintain copies of all transmittal documents and acknowledgments of license conditions from end-users. These acknowledgments could include a statement of how the user will comply with the license requirements.

The company should also develop procedures for: (1) obtaining government approval prior to re-transfer to a party not included in the government authorization of an item or technical data transferred or exported originally to the company, and (2) tracking the re-export or re-transfer (including placing parties on notice that the proposed transfers involve U.S. origin products and labeling such products appropriately). These procedures should address transfers such as when a controlled item or technical data is: (1) transferred by the company to a foreign national employed at the company; (2) transferred by the company to a foreign person within the U.S.; (3) transferred by the company to a foreign person outside the U.S.; and (4) to be used or transferred for an end-use not included in the government authorization. The company should also develop procedures to investigate any evidence of diversion or unauthorized use of U.S. origin products.

5. Self Assessments and Monitoring

Fifth, each business unit should have an employee (or multiple employees depending upon the size of the business unit) whose job responsibility includes monitoring license, agreement and proviso activity at the program or transaction level. For licenses involving

technical data, at least one employee with compliance responsibility should have a relevant technical background. These employees should perform periodic self-assessments to ensure compliance with the license authorizations and report results to management as well as corporate audit personnel.

I. HANDLING FOREIGN NATIONAL ISSUES

With commerce becoming increasingly international, many companies now employ and conduct business with non-U.S. citizens on a daily basis. Therefore, companies must have adequate safeguards to prohibit foreign nationals—employees, customers, and visitors—from gaining unauthorized access to controlled products or technology which, as explained above, are “deemed exports.”

Bi-directional foreign direct investment (into and from the U.S.) is likely to be a trend of growing importance as the globalization phenomenon takes root in the defense industrial sector. The trend toward international ownership or participation appears likely to grow in response to the economic incentives for cross-border consolidation. The dilemmas created by the burden of export controls falling on “U.S. persons” makes the issue of foreign nationals especially important for the compliance function. The increased role of foreign nationals in the defense sector will not only create issues for multinational management, but more significantly for the technical and scientific collaboration that goes to the heart of the incentive for cross-border collaboration.

A “best practices” standard for handling foreign national issues has four basic features:

- Identifying foreign nationals;
- Screening foreign nationals for export licensing issues;
- Submitting appropriate license applications;
- Developing technology control plans and safeguards such as:
 - Instilling a security mindset
 - Badging
 - Physical security
 - Computer security
 - Recordkeeping procedures
 - Electronic surveillance

1. Identifying Foreign Nationals

First, the company must identify foreign national employees, customers and visitors. Companies must also give attention to other potentially relevant foreign nationals, including employees of suppliers, consultants, and representatives. This effort requires close coordination by all functional areas such as security, human resources, marketing, programs, engineering, legal, shipping, contracts, customer service, and computer services.

2. Screening Foreign Nationals for Export Licensing Issues

Second, the company must screen foreign nationals for export licensing issues to identify any controlled technology to which the foreign national may have access and determine whether a license is required.

3. Submitting Appropriate License Applications

Third, the company must submit appropriate license applications. As with all transactions involving a license or technical assistance agreement, foreign nationals should be screened against the Denied Persons List and Entities List. In addition, however, some companies have developed procedures to monitor the job responsibilities of potential foreign national employees to anticipate future licensing requirements and respond to changes in supervisors, job groups or job responsibilities. Periodic re-screening and re-classification will help ensure that companies comply with applicable export regulations.

4. Developing Technology Control Plans and Safeguards

Fourth, the company must develop technology control plans and develop adequate safeguards to avoid export violations. Of foremost importance in this effort is the creation of a “culture of security” within a company. Industry representatives have stated that security personnel alone are not adequate to prevent or detect all potential security violations. Security must be the concern of all personnel. Thus, one company has designated all of their employees as the “compliance police” while other companies stress that security is the responsibility of all employees. To instill this culture of security, employees should be informed through corporate directives, written procedures, and training sessions that it is their role to identify security issues and report them to appropriate personnel in a timely manner. In addition, foreign nationals and their supervisors should sign appropriate “non-disclosure agreements” that affirm acknowledgment of any access restrictions and prohibitions.

Companies should also ensure that access by foreign nationals is limited to only that specific information for which appropriate U.S. government disclosure authorization has been obtained—e.g., for controlled technology, an approved export license or technical assistance agreement. One company has created a comprehensive manual that details procedures on foreign national employees, foreign national visitors, and competitors’ visitors. These procedures should address areas such as:

Badging: All foreign nationals should receive distinctive badges that clearly separate them from non-foreign national personnel. Most companies interviewed by the Task Force had implemented badging procedures. These badges, or attachments thereto, should contain information describing where the foreign national is permitted to be in the plant and what information the foreign national is permitted to receive. In addition, the badge should state whether an escort is required for the particular foreign national. Further, employees, particularly escorts and hosts of foreign visitors, should be trained to recognize suspicious activity and given instructions on whom to contact if they are unsure whether a foreign national is allowed access to certain areas or information.

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Physical Access: Foreign national employees and visitors should generally have only limited access to certain areas in the facility. Although varying by individual business unit, many companies interviewed by the Task Force provide limited access to foreign nationals. One company, for example, has designated certain floors in a particular building as the area where foreign nationals may reside and have office space. Thus, unless a foreign national is in a certain area pursuant to a license proviso, he or she should be in the designated areas. Limiting physical access allows easier tracking of foreign nationals. This access can be limited by security guards, card-swiping stations, or other means. Foreign national cards will be programmed to permit access only to areas that are encompassed within their license exceptions.

Computer Security: Computer security systems should also be installed that limit foreign national access to non-releasable information. Many companies interviewed by the Task Force have labeled foreign national visitor and employee accounts with the equivalent of foreign national badges. For example, foreign nationals will receive log-on identification numbers that only allow access to e-mail and certain other public sites.

Recordkeeping Procedures: Employers should also establish recordkeeping procedures for all relevant export-related documents for foreign national employees, subcontractors, visitors, and customers. Recordkeeping of foreign national visitors at the company's facilities, for example, should include a requirement that employers maintain a record of all foreign national visits and the licenses and provisos attached to the visits. This record should indicate: (1) the visitor's name; (2) the name of the entity represented; (3) the date of the visit; (4) persons visited; and (5) purpose of the visit.²²

Electronic Surveillance: Electronic surveillance techniques, where appropriate, can be employed to monitor physical security. Although not uniformly instituted, many companies interviewed by the Task Force have installed electronic surveillance devices, particularly in sensitive areas. Remote cameras, for example, could be installed throughout the facility to observe workers and identify security issues.

J. RECORDKEEPING

Recordkeeping is reportedly the most widely overlooked area of international business compliance. Requirements related to export activities are complex and vary by regulatory regime. Therefore, all companies interviewed by the Task Force believe that employees must be given guidance on how to properly maintain and preserve the integrity of pertinent records. These export-related recordkeeping practices should be incorporated into existing recordkeeping and business systems to the extent possible.

A "best practices" approach to recordkeeping has three dimensions:

- General export-related recordkeeping procedures;
- Documenting certain communications with foreign nationals; and
- Documenting certain communications with the U.S. government

²² See NISPOM, Chapter 6.

1. General Export-Related Recordkeeping Procedures

A company must develop and implement general export-related recordkeeping procedures. These procedures should, at a minimum:

- Identify the transactions that create the company’s need to keep specific records;
- Identify the records that must be maintained;
- Describe record maintenance procedures and locations;
 - Documents should be kept in easily retrievable form and location
 - Filing system should allow easy matching of invoices, shippers export declarations, delivery notes, air waybills, and intangible records such as technical data logs
- Identify those persons or functions responsible for maintaining and insuring the integrity of the records;
- Determine the period of time records must be kept; and
- Provide for regular internal review of files to ensure proper practices and procedures by persons reporting to top management

These records can be kept in a variety of ways, but as a rule of thumb, the company should be able to retrieve any required documents within 48 hours of request for retrieval. Furthermore, documents should be kept in the original format where feasible.

2. Documenting Certain Communications with Foreign Nationals

As noted above, perhaps the greatest risk of inadvertent violations of export laws and regulations occurs during informal technical exchanges through telephone, facsimile, electronic mail, or in person. Although very difficult to control, a “best practices” system to deal with these communications could include a requirement to prepare a brief memorandum documenting all potentially relevant communications with foreign national customers and visitors, with an additional requirement to provide export compliance personnel with a copy of such records. Instituting this type of recordkeeping requirement would serve to heighten employees’ awareness that such communications are high-risk areas for potential export violations, thereby minimizing the risk of an inadvertent violation. Similarly, companies should implement measures that will assist recovery of information and other electronic communications on the company’s computer systems and electronic mail facilities. These efforts will assist export compliance personnel in detecting and investigating potential export violations by creating a robust audit trail.

3. Documenting Certain Communications with the U.S. Government

In addition, companies should develop and implement a system to document all conversations with government officials involving potentially relevant interpretations or other guidance on export control issues. These records can provide continuity in performing future export compliance functions, and may assist the company in defending its actions if necessary. Copies of all such records should be provided to and maintained by export compliance personnel.

K. AUDITS

Virtually all persons interviewed by the Task Force concurred that a comprehensive audit system is a necessary component of any “best practices” export compliance program. However, particularly with a system as complicated as export compliance, the structure of the audit system is vital.

A “best practices” audit program has six essential features:

- Experienced audit personnel;
- Internal business unit assessments;
- Internal corporate audits;
- External audits;
- Reporting audit results to the business unit and Board of Directors (or committee thereof); and
- Effective follow-up procedures

1. Audit Personnel

First, the experience of audit personnel is crucial. Audits conducted solely by untrained or inexperienced auditors may not “dig deep enough” into the export compliance system. Indeed, some interviewees claimed that these audits will often mistakenly give a clean bill of health to an export compliance system that is deficient simply because the auditor did not know where to look or did not understand the data presented.

Thus, in order to satisfy “best practices,” a company must effectively combine both the auditing experience of external or corporate auditors—whether actual auditors or outside counsel—and the substantive experience of export compliance personnel. For example, one company interviewed conducts audits of its business unit’s export compliance systems by teaming two or three corporate auditors with an employee from the export compliance office and, on occasion, an empowered official or export compliance officer.

In addition, auditors must receive appropriate training to be effective. This training can be done by corporate compliance personnel or external consultants. Some companies combine both types of training by providing several hours of in-house training and also retaining external consultants—law firms, companies, or individuals—to provide several hours of additional training. The training should be tailored to the company’s business operations and export compliance issues, but should include explanations of U.S. export laws and regulations, the license application process, implementing license authorizations and provisos, and risk areas for export violations.

2. Internal Business Unit Assessments

Second, each business unit must have its own internal assessment system. These internal assessments have several advantages. For example, while it is often logistically complicated to engage in random, unannounced corporate or external audits, the same difficulties do not arise for internal assessments. Thus, these assessments can be conducted more frequently than external or corporate audits. Moreover, internal assessments can successfully focus management attention at the business unit level on risk areas at an early stage, affording the opportunity to correct deficiencies before they result in major problems. The internal assessments may be

conducted by export compliance personnel, business unit audit personnel, or other competent business unit personnel. These internal assessments should be tailored to a business unit's operations, but should generally involve a transaction-level and process-level review of the business unit's export compliance efforts, with a special emphasis on high-risk areas. All the companies interviewed by the Task Force incorporated some form of internal assessments.

3. Internal Corporate Audits

Third, companies should schedule internal corporate audits. These audits should be conducted at intervals consistent with risk management principles. Further, these audits should focus both on the export compliance process and the specific export transactions of the business unit in question to ensure that it is complying with existing processes. An export compliance audit should be tailored to a business unit's operations but should, at a minimum, cover the following areas:

- Management commitment;
- Policies and procedures;
- Training and education;
- Obtaining export authorizations;
- Implementing license authorizations;
- Self assessments/audits;
- Reporting violations;
- Technical data and foreign nationals;
- Recordkeeping;
- Risk assessment (particularly high-risk areas);
- Evaluation of internal controls to ensure compliance;
- Comparison of operational practices to written procedures; and
- Procedure for corrective action and follow-up

4. External Audits

Fourth, the company should utilize outside auditors to periodically review its export compliance program. Some industry experts believe that external audits are a necessary component of an effective export compliance program. Although not all companies interviewed utilize such external audits, several opined that such a program could effectively enhance the companies' export compliance programs, especially at the "policy and procedure" level. These audits should generally be conducted at the direction of the legal department to preserve the confidentiality of the audit results. External audits are also recommended by the U.S. government in other relevant contexts.²³

²³ The NISPOM suggests that the government, playing the role of an external auditor, should conduct both announced and unannounced reviews of cleared contractor facilities to ensure that safeguards employed by contractors are adequate for the protection of classified information. NISPOM, Chapter 1, Section 207.

5. Reporting Audit Results

Fifth, audit results must be reported appropriately to be effective. All audit reports should be supplied to the business unit in question and appropriate management. Further, if an audit's findings raise serious questions concerning export compliance risks, the matter should be referred to a senior corporate manager and appropriate committee of the Board of Directors (e.g., Audit Committee).

6. Effective Follow-Up Procedures

Sixth, the company must assign responsibilities to effectively implement audit recommendations. The company should, for example, provide training following any compliance audits which focuses on the audit findings and recommendations and any identified weaknesses. The company must also assign responsibility and establish processes to ensure that necessary and timely corrective actions are taken. Additional follow-up should ensure that corrective action was actually implemented. At most companies interviewed, this function is performed by the corporate audit staff. Finally, the company should update its audit procedures as necessary following audits or other periodic procedure reviews.

L. HANDLING SUSPECTED VIOLATIONS

An effective export compliance program seeks to prevent export violations, but must also have procedures in place to detect and report suspected violations.

A “best practices” standard for a reporting system has five basic features:

- Senior management commitment to reporting;
- Unconstrained avenues for reporting without retribution;
- Internal procedures for handling reports;
- Procedures for external reporting; and
- Appropriate discipline for non-compliance

1. Management Commitment to Reporting

First, management must encourage employees to report suspected export violations. Management must effectively communicate to employees that reporting suspected violations is an integral part of an effective compliance program and that employees have the responsibility and duty to report suspected violations.

2. Avenues for Reporting

Second, the company must provide clear instructions on where the suspected violation should be reported. The Federal Sentencing Guidelines for Organizations, for example, provide that to effectively prevent and detect violations of the law, the organization “must have in place and publiciz[e] a reporting system whereby employees and other agents [can] report criminal conduct by others within the organization without fear or retribution.”²⁴ Similarly, the NISPOM states that reporting hotlines must provide an “unconstrained avenue for [employees] to report, without fear of reprisal, known or suspected instances of serious security irregularities and

²⁴ U.S. Sentencing Commission, Guidelines Manual, § 8A.1.2, cmt. n.3(k)(5).

infractions concerning contracts, programs, or projects.”²⁵ All companies interviewed agreed that reporting suspected violations was vital to maintaining a strong export compliance system and further agreed that a company’s reporting procedures should be widely marketed to employees throughout the company. Suspected violations can be reported in a variety of places including an ethics hotline, legal department, or an export compliance office. Employees should be assured that reports are completely confidential.²⁶

3. Internal Procedures for Handling Reports

Third, procedures should be developed explaining the process followed by the company after a suspected export violation is reported. This process must include appropriate internal investigation procedures, notification to the reporting employee of the outcome of the investigation, and notification of corporate management if noncompliance is discovered.

4. Procedures for External Reporting

Fourth, the company should establish procedures for reporting suspected violations to the U.S. government. Both the State Department and the Commerce Department have voluntary disclosure programs under which the disclosure will be considered as a mitigating factor in determining the remedy imposed by the agency. In order to be considered “voluntary,” disclosures must be made prior to the time that the State Department, Commerce Department or any other agency, bureau or department of the U.S. government obtains knowledge of either the same or substantially similar information from another source and commences an investigation or inquiry that involves that information. Further, the voluntary disclosure must be made with the full knowledge and authorization of senior company management.

Also, companies may adopt procedures similar to those discussed in NISPOM regarding contractors. According to that manual, “contractors shall promptly submit a written report to the nearest field office of the FBI regarding information coming to the contractor’s attention concerning actual, probable or possible espionage, or subversive activities, at any of its locations.”²⁷ This includes adverse information concerning any of its cleared employees; efforts by any individual, regardless of nationality, to obtain illegal or unauthorized access to classified information or to compromise a cleared employee; all contacts by cleared employees with known or suspected intelligence officers from any country; and any contact which suggests an employee may be the target of attempted exploitation by the intelligence services of another country.

In the export compliance arena, company employees should be encouraged to report similar activities surrounding illegal export activity. Access to this type of information would help both government and industry better identify and protect targeted areas of sensitive technology. Programs such as the Customs Service’s Project Gemini, described in section IV.G.8 above, provide formalized avenues for reporting suspicious export activities observed by companies.

²⁵ NISPOM, Chapter 1, Section 208.

²⁶ The need to protect employees from retribution—from both supervisory and non-supervisory personnel—has been the subject of much commentary. See, e.g., Resolution and Report: Employee Confidentiality and Non-Retributory Reporting Systems (Ethics Resource Fellows Program 1999).

²⁷ NISPOM, Chapter 1, Section 301.

5. Appropriate Discipline for Non-Compliance

Finally, those who violate U.S. export laws and regulations—or company export policies and procedures—should be subject to appropriate administrative and financial penalties. One advisor to the Task Force has stated that there is probably no more effective tool in repairing a company’s export compliance program than terminating some employees for non-compliance when justified and warning other employees that non-compliance will not be tolerated. Many companies in the industry have disciplinary mechanisms in place for violators of export laws or company export policies and procedures. These punishments can range from reprimands to termination depending upon the seriousness of the violation and must be decided on a case-by-case basis.²⁸ Some companies may, however, develop general guidelines—such as those contained in the NISPOM—that establish and apply a graduated scale of disciplinary actions in the event of employee violations or negligence.

In addition to disciplinary actions, management should also take whatever other action may be needed, including modification of the compliance program, to prevent and detect violations in the future.

V. CONCLUSION

Formalized, company-wide compliance programs are strongly encouraged by executive and judicial branch authorities and the Task Force believes that the foregoing practices generally should be incorporated into an export compliance program to maximize its effectiveness. The Task Force reiterates, however, that these standards cannot be mechanically or rigidly applied and that the application of these standards must be tailored to each company to produce the most effective compliance system.

The Task Force is also cognizant of the potentially significant resources that would be necessary to implement every “best practice” articulated herein, and that in some cases the implementation of a “best practice” may be impractical or unnecessary. Each company must identify, from a management perspective, the best method to allocate its personnel, systems, and budget to satisfy business and export compliance requirements.

²⁸ Among the factors a company should consider, for example, is whether an employee voluntarily comes forward with a possible violation. Companies should encourage employees to report suspected violations because early detection can minimize the potential damage caused by export compliance problems.

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APPENDIX A

OVERVIEW OF BEST PRACTICES

KEY AREA	ELEMENTS	A. NOTES
MANAGEMENT COMMITMENT	<ul style="list-style-type: none"> • Communicating the commitment • Actively involved in export compliance • Providing resources to develop and implement the program • Evaluating and ensuring effectiveness of the program 	<ul style="list-style-type: none"> • Most important aspect of an effective export compliance program
COMPLIANCE COUNCIL	<ul style="list-style-type: none"> • Chaired by a senior executive • Membership includes senior management (corporate and business units) • Meets at least quarterly • Creates “working groups” • Creates appropriate records • Reports to Board of Directors (or committee thereof) 	<ul style="list-style-type: none"> • Serves a critical function in overseeing a company’s export compliance program and implementing management’s export compliance objectives
EXPORT COMPLIANCE PERSONNEL	<ul style="list-style-type: none"> • Must be of sufficient quantity to perform critical functions • Must be of sufficient quality to ensure competent performance • Must be in the proper location to implement export objectives effectively (i.e., independent) 	<ul style="list-style-type: none"> • Must be aware of potential compliance vulnerabilities during company transitions (e.g., mergers, layoffs, reorganizations)
B. EXPORT COMPLIANCE INSTRUCTION MANUALS	<ul style="list-style-type: none"> • Appropriate content regarding export compliance (e.g., summaries of laws and regulations, diagrams, policies and procedures, samples) • Policies and procedures contained in the manuals should address key areas (e.g., training, recordkeeping, audits) • Instruction manuals should be clearly written, widely distributed and easily accessible • Manuals should be frequently reviewed and updated as necessary 	<ul style="list-style-type: none"> • Manuals are necessary tools to educate employees about export compliance programs • Business units should also develop and maintain their own compliance instruction manuals tailored to their business operations and compliance program
EXPORT COMPLIANCE INTRANET SITE	<ul style="list-style-type: none"> • Appropriate content regarding export compliance; related links • Interactive training system to test export compliance comprehension • “Ask questions” section for employees • Update mechanisms • Effective encouragement to use intranet site • Computer security 	1.

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KEY AREA	ELEMENTS	A. NOTES
C. TRAINING AND EDUCATION	<ul style="list-style-type: none"> • Compliance council oversees training • Training is conducted by export compliance personnel • Top level briefings for Board of Directors (or Committee thereof) • Top level training for senior management • Introductory awareness training provided to all employees • Intermediate training provided to all employees involved in export compliance • Advanced training provided to key export compliance personnel • Comprehension tests for those regularly involved in export compliance • Refresher and update training provided as necessary • Training records maintained • Special emphasis on training in high-risk areas 	<ul style="list-style-type: none"> • Foundation of any successful compliance program
D. LICENSE APPLICATION PROCESS	<ul style="list-style-type: none"> • Procedures for identifying licensing requirements • Planning for license requirements • Standardized license applications • Automated license processes • Procedures for screening against relevant government lists • Multiple layers of review, with central liaison for government submissions • More focused licensing controls for recognized high-risk areas • Develop and maintain positive relationship with the government 	E.
IMPLEMENTING LICENSE AUTHORIZATIONS	<ul style="list-style-type: none"> • Written license administration plans for each license/agreement • Train business unit personnel on license authorization limits • Maintain technical data transfer logs • Maintain transmittal and acknowledgments of license conditions • Self-assessments and monitoring 	<ul style="list-style-type: none"> • Properly implementing licenses and provisos is just as important as obtaining the license itself
FOREIGN NATIONALS	<ul style="list-style-type: none"> • Identify foreign nationals • Screen foreign nationals for export licensing issues • Submit appropriate license applications 	

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KEY AREA	ELEMENTS	A. NOTES
	<ul style="list-style-type: none"> • Develop technology control plans and safeguards such as: <ul style="list-style-type: none"> - Instilling a security mindset - Badging - Physical security - Computer security - Recordkeeping procedures - Electronic surveillance 	
RECORDKEEPING	<ul style="list-style-type: none"> • Identify the transactions that create the company's need to keep specific records • Identify the records that must be maintained • Describe record maintenance procedures and locations • Identify those persons or functions responsible for maintaining the records • Determine the period of time records must be kept • Provide for regular internal review of files to ensure proper practices and procedures by persons reporting to top management • Document all relevant communications (e.g., phone calls, meetings) with foreign nationals • Document all conversations with government officials regarding potentially significant export issues and ensure appropriate export compliance personnel are aware of all such communications 	
AUDITS	<ul style="list-style-type: none"> • Experienced audit personnel • Internal business unit assessments • Internal corporate audits • External audits • Focus on high-risk areas • Reporting audit results to business units and Board (or committee thereof) • Effective follow-up procedures 	

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KEY AREA	ELEMENTS	A. NOTES
F. HANDLING SUSPECTED VIOLATIONS	<ul style="list-style-type: none">• Senior management commitment to reporting• Unconstrained avenues for reporting without retribution• Internal procedures for handling reports• Procedures for external reporting in certain circumstances• Appropriate discipline for non-compliance	

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APPENDIX B

GLOSSARY

AECA	Arms Export Control Act. Empowers ODTC at State Department to implement the ITAR.
BXA	Bureau of Export Administration (Commerce Department). Administers EAR.
CCL	Commerce Control List. Lists controlled commodities under the EAR.
DoD	Department of Defense.
DTRA	Defense Threat Reduction Agency. Agency within DoD responsible for monitoring certain State Department licensing activity.
EAA	Export Administration Act (expired). Promulgating authority for EAR. If reenacted, would be the authority for enforcement of EAR. <u>See</u> “IEEPA.”
EAR	Export Administration Regulations. Control the export of “dual-use commodities.” Administered by the Commerce Department (BXA).
ECC	Export Compliance Council.
ECO	Export Compliance Officer.
EPCI	Enhanced Proliferation Control Initiative. Presidential initiative resulting in regulations focusing on end-use and end-users of exported items.
FOCI	Foreign owned, controlled or influenced.
GAO	General Accounting Office. Investigative arm of Congress. Conducts audits and reviews of government programs.
GSC	Government Security Committee (NISPOM). Committee comprised of senior management and certain board members responsible for ensuring that company complies with U.S. export control laws and regulations.
IEEPA	International Emergency Economic Powers Act. Authority for maintaining EAR after EAA expired in 1994. Also provides much of the authority for maintaining embargoes. <u>See</u> “OFAC” and “TWEA.”
ITAR	International Traffic in Arms Regulations. Regulate the export of defense articles and defense services from the United States to any foreign destination or to any foreign person, whether located in the United States or abroad. Administered by the State Department (ODTC).

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- NISPOM** National Industrial Security Program Operating Manual. Prescribes requirements, restrictions, and other safeguards necessary to prevent unauthorized disclosure of classified information and to control authorized disclosure of classified information released by U.S. government to its contractors.
- ODTC** Office of Defense Trade Controls (State Department). Responsible for export licensing, export regulations (ITAR), and associated functions.
- OEE** Office of Export Enforcement (Commerce Department). Primarily focused on investigating and interdicting illegal transactions, as well as prosecuting violations. Also reviews a significant portion of export license applications submitted to BXA.
- OFAC** Office of Foreign Assets Control (Treasury Department). Administers both comprehensive and partial embargoes against several foreign countries.
- TAA** Technical Assistance Agreement.
- TWEA** Trading With The Enemy Act. Provides much of the authority for embargoes administered by OFAC.
- USML** United States Munitions List. List of items and technical data considered “defense articles” and “defense services,” including commercial communications satellites and related items.