

TYPES NOT MAPPED YET October 27, 2011 | TTR not mapped yet | Robert A. Shapiro, Sean McGowan

International trade compliance: 6 basic products questions a company should answer

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All too often, companies that thought they were complying with international trade laws are publicly flogged with penalties imposed by the relevant legal agencies, or find that they pay the not so public price of legal and investigation costs to avoid or mitigate such penalties.

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What?

What is the product? Obviously, companies know a great deal about their products, but often, the relevant documents do not clearly describe the product or provide sufficient information to assure compliance with international trade law. What is the product commonly called?

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- Is there an industry-specific reference term for the product (i.e., chemicals are commonly referenced by their CAS number and certain alloys may be referenced by their ASTM standard)?
- What is the product made of? Is there relevant technical information, schematics and/or marketing literature that will help explain the nature of the product?
- For products being imported, the answers to these questions will help determine the admissibility of a product and its Harmonized Tariff Schedule of the United States (HTSUS) classification, which dictates the duty rates a company must pay upon entry.

For export purposes, the answers to these questions with respect to both the product and its components will help determine jurisdiction. Products on the U.S. Munitions List (USML) (i.e., defense articles, technical data or defense services) are controlled for export by the International Traffic in Arms Regulations (ITAR). "Dual use" products are

listed on the Commerce Control List (CCL) and controlled pursuant to the Export Administration Regulations (EAR). Other regulations may be applicable to exported products in addition to, or instead of, those listed above.

Companies - regardless of whether they are importing, exporting or both - should develop a matrix - a "master" product database that includes, at a minimum, all of the company's goods, technology and/or services; their HTSUS classifications; export classifications (USML Category or ECCN); Schedule B Numbers; and origins. Where applicable, the matrix should also include additional classifications or identifications relevant to the industry, such as CAS numbers, ASTM standards and FDA codes. The matrix should be accessible to any company personnel who may be involved in imports, exports or foreign sales of the company's products or technology.

Who is the supplier, the producer, the customer? The presence of relationships between any of the parties involved in the transaction may raise questions about the value of the imported merchandise.

Import and export issues may also arise when products are specifically produced for a customer. Did that customer provide anything of value used in the production of the imported article? Perhaps the customer anticipated a satellite or military application for the product. If so, the item is likely to be controlled for export.

Is the customer a distributor, OEM or service provider in a foreign country that is permitted under local law to do business in sanctioned countries? If so, have controls been implemented that are reasonably calculated to prevent the products or services from being re-exported in violation of U.S. export or sanctions laws? Who is marketing the product? If the product is ITAR controlled, are the sales agents registered as brokers as required by the ITAR?

Under the U.S. laws, a company has a responsibility to know their customers and suppliers. The U.S. prohibits transactions - both import and export - with certain individuals and entities. To avoid violating these prohibitions, all companies should establish a system to screen customers and suppliers against the relevant U.S. Government sanctions lists. Additionally, the Customs Trade Partnership Against Terrorism arguably imposes a "know your suppliers" obligation, and U.S. export control laws explicitly require exporters to "know their customer."

Finally, perhaps most importantly, the "who" question directs the compliance department to the persons who may have the information necessary to fully understand the product. Within any company these are likely to include research, product development, procurement, manufacturing, contracting and accounts payable individuals.

Where?

Where is the product made? For many companies, the world is their assembly line - a fact that complicates a company's ability to determine certain aspects about the nature of a product, including its origin and whether export controls are applicable. Understanding the manufacturing operation and where each step is performed is central to determining the origin of the product for duty and marking purposes. Equally important is knowing the source of raw materials or the location where components are being manufactured.

Where is the product being sold or used? The ultimate destination of a company's product is critical because the U.S. exercises export control over U.S. origin goods and technology wherever they are located, and the applicable export controls may be destination-dependent. The EAR and OFAC regulations combine to generally prohibit most exports or re-exports of U.S. origin goods to embargoed and sanctioned countries (e.g., Cuba, Iran, North Korea, North Sudan and Syria, and, with regard to financial services, Burma), even if done indirectly (e.g., transshipped through a third country). The ITAR requires an authorization for all exports of USML items and prohibits exports to a longer list of countries.

Why?

Why is the product being manufactured/sold (i.e., what is the end-use of the goods, technology or services)? Certain products are classified under the HTSUS in accordance with their actual use after importation; others, by their principle use. An understanding of the purpose for which the item is designed and for which it may be used can provide important information regarding the classification of the product.

For exporters, it is important to understand the intended use of a product from the outset. Products designed for military applications may be subject to the ITAR even if there is no specific military customer and civil end-uses have since been developed. The EAR prohibits sales for certain end-uses (e.g., missile systems, chemical and biological weapons, maritime nuclear propulsion) regardless of the product. Finally, a poor fit between the customer and the product may be an indication of illegal activity (i.e., a "red flag").

How?

How is the product being made and what are your supply chain processes? Is the production process simple or complex? Will the product be further manufactured after importation? The resolution of these "how" questions will assist the compliance department in understanding classification, ascertaining the appropriate country of origin marking on a product, and determining if there may be additions to the value, such as for assists.

With regard to export controls, if a company is collaborating with foreign entities on making a product, technical exchanges undertaken with those foreign entities may require export authorizations. This applies even if the foreign collaborator is a parent, a subsidiary or a branch office. Similarly, are persons who are not U.S. citizens or Green Card holders involved in the manufacturing operations? Their exposure to manufacturing or design information will likely be "deemed" to be exports to their home country and may require a license.

When?

When should a company consider these questions? The answer is simple: the sooner the better. It takes time to gather all of the necessary product information. To avoid delays when a product is ready to be shipped, compliance personnel should get involved at the time of product development, the contract negotiation stage or, at the latest, the ordering/sales stage. Doing so allows a proactive approach that can minimize or avoid delays and enhance compliance.

Conclusion

International trade compliance starts with a systematic approach to gathering the necessary product information. In this article, we have focused on the six basic “question words” that can assist in the information gathering process.

While the reasons for obtaining this information may be different, there is commonality between export and import product information gathering. The final step is to assure that there is a robust process for storing and accessing this information. To this end, we find a product matrix or database to be a best practice and an essential component of most international trade compliance programs.

(Source: Corporate Compliance Insight, Oct. 10, 2011 & Oct. 12, 2011)

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