

# Export Compliance Daily

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## Failure to Monitor Gov't Guidance Could Lead to Enforcement Risks, Lawyers Say

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The U.S. is increasingly expecting companies to monitor government guidance as well as export violations committed by others, and to use those cases as “lessons learned” to improve their own compliance programs, lawyers said this week.

While there’s no “obligation” for companies to be aware of every instance of a business breaching U.S. export controls, new DOJ guidance suggests that they should at least be “aware of where the pitfalls are and where the concerns may lie,” Sean Riley, a former Commerce Department official, said during a webinar last week hosted by the Association of Certified Sanctions Specialists. That way, “you can stay one step ahead and be able to defend your” due diligence process.

DOJ updated its corporate compliance program guidance last month with new language that said U.S. prosecutors, during an investigation, should consider whether a company has revised their compliance program “in light of lessons learned,” either from past issues within that company or from violations committed by others.

Prosecutors may look at whether the company has a “process for tracking and incorporating into its periodic risk assessment lessons learned either from the company’s own prior issues or from those of other companies operating in the same industry and/or geographical region,” the guidance said.

Riley, a lawyer with Hughes Hubbard, said companies working with export controlled items or technologies should be aware of how their products may be used in a way that violates trade restrictions, which can help them monitor for lessons that they can incorporate into their compliance programs.

“If you’ve got a highly technical product that can be used in aviation, that can be used in [unmanned aerial vehicles], then certainly you want to keep abreast and stay ahead of the explicit guidance and news reports of these components being found in drones or UAVs that are crashing in Kyiv,” he said. Knowing all the ways your products can be used “may give you a sense of” which cases to follow to help improve your compliance program.

Riley said companies should specifically be monitoring for new regions that foreign companies may be using as transshipment points to illegally send export controlled items to prohibited countries, such as Russia. He said many companies are already aware that Russia has sourced items from places like Turkey, Hong Kong and Dubai, but new regions may pop up as existing diversion routes are shut down.

It's about developing a process "that you can feel proud of when the regulator asks and you can say, 'Hey, this is how we make sure we do the best we can to make sure that our products, our items, our services, don't fall into the wrong hands,'" Riley said.

Michael Huneke, also a Hughes Hubbard lawyer, noted that DOJ also stressed that companies should be closely monitoring government guidance as part of their compliance programs. He said the U.S. has issued some "very specific" export control guidance, including about how Iran is procuring U.S. parts for drones sent to Russia and how companies should be conducting due diligence on customers buying those parts (see 2306090040).

"There's guidance about ballistic missile programs. There's guidance about freight forwarding. There's guidance about maritime terms. There's all kinds of guidance that's out there," Huneke said. "They do expect you to look at and be aware of the guidance that they issue."

DOJ may be able to point to government guidance or a previous settlement when prosecuting a company for an export control violation, he said. DOJ could argue a company should have been aware of a red flag that the government had warned about.

"So it's a bit of an unfair circumstance, because they are issuing guidance that, in their mind, establishes the threshold for what's a high probability of violation of the [Export Administration Regulations] or not," Huneke said. "And then they're going to use their own guidance to decide whether to investigate you, to decide whether to send an administrative subpoena to you, and ultimately whether there's some kind of enforcement action that they bring."

Huneke suggested this helps to give DOJ wide latitude to be able to charge a company with an export violation, adding that "they're creating, through guidance and settlements, nuances and legal standards that are not part of the statute, that weren't passed by Congress."

He also said it's often difficult for a company to win a "constitutional" challenge against DOJ in this situation because filing that challenge will take time, and by the time the issue reaches a court, "you've already been investigated. It's probably already become public. You've probably already had to make disclosures to your investors and to the marketplace," Huneke said. "So there's a good reason why many companies end up deciding to settle in that context with the DOJ once there's an investigation launched."

Huneke said government compliance expectations will likely continue to rise.

"We will all celebrate the day when the government comes with an announcement saying, 'OK, everyone can do less.' But they don't do that, right?" he said. "It's always a one-way ratchet that keeps going up and up."

Both Huneke and Riley said companies can manage rising government expectations by approaching compliance through the lens of the government's high-probability

threshold -- the language in the EAR under which companies may face penalties if they follow through with an export even if they know there's a high probability it will violate U.S. export controls.

The lawyers pointed to examples of an Indian tandoori restaurant buying a shipment of dual-use parts, a Dubai company buying a snowmobile or the Seychelles buying technology used in space programs. The Bureau of Industry and Security "has emphasized where you see unexpected increases, things that just don't make sense," that may be a red flag, Huneke said.

"One aspect of this is just using your common sense," Riley added. "Is [your customer] really an end user of this item, or is it going on to someone else? All of those sorts of things can be viewed as, potentially, an awareness of a high probability."

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