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Overview

• Understanding Restrictions Relating to U.S. Embargoed Countries
  – When can you fly to such countries?
  – When can you sell, lease, or charter an aircraft to a person in such countries?
• What are Restrictions on Dealings with Specially Designated Nationals (SDNs) and other Barred Persons?
• What Aircraft/Parts are Subject to Stricter Export Restrictions to Non-Embargoed Countries?
• Why You Should Understand Anti-Corruption Law:
  – Grease payments to foreign airport/customs officials
  – Gifts and entertainment for foreign government officials
• Red Flags that Should Alert You to Potential Problems
Don’t Let This Happen to You!

• Orion Air – Export Violations
  – Spanish Airline wet leased BAe 146 aircraft to Syrian Pearl Airlines
  – Blacklisted in 2009
  – Lesson learned: Foreign entity cannot ignore warnings from U.S. regulators

• Bizjet – Foreign Corrupt Practices Act (FCPA) Settlement
  – Paid $11.8 million to settle criminal charges
  – Allegations that paid bribes to Mexican and Panamanian officials to obtain work
  – Considered small fine (Bizjet voluntarily disclosed)
U.S. Export and Embargo Laws
Who Is Subject to U.S. Jurisdiction?

• **“U.S. Persons”**
  – U.S. citizens and permanent resident aliens (green card holders) wherever located
  – Any entity organized under the laws of the U.S.
  – Any person or entity in the U.S.

• Entities owned or controlled by U.S. entities, including foreign subsidiaries - Cuba, Iran (as of Oct. 9, 2012)

• Anyone in possession of U.S.-origin goods or technology (*in rem* jurisdiction over the U.S.-origin good)

• Anyone flying an “N” registered aircraft

• Anyone engaging in certain barred activities involving terrorists, proliferators of weapons of mass destruction, etc.
Terminology

- **What is an “Export”?**
  - Actual shipment or transmission of goods, technology, software from the U.S. to a foreign country

- **What is a “Re-export”?**
  - Re-transfer of U.S.-origin goods from one foreign country to another

- **Temporary Sojourn** – export or re-export of a vessel or aircraft where there is no transfer of “operational control”

- **What is “Facilitation”** – (in context of U.S. embargo laws)
  - When a U.S. entity assists in any manner a third country entity to engage in a transaction with an embargoed country that it could not enter into directly, such as **financing, brokering**, insuring, or approving an activity that they could not enter into directly
Export Administration Regulations (EAR)

- Administered by U.S. Department of Commerce Bureau of Industry and Security (BIS)
  - Controls foreign made goods containing 10% or more U.S.-content by value
- Licensing requirements based on the export classification of the goods and the destination (end-user/country)
  - Export Control Classification Number (ECCN)
  - EAR 99
- Most goods can be shipped to most countries without a license or under license exceptions
Foreign Assets Control Regulations (FACR)

- Administered by the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC)
- Almost total embargoes on Cuba, Iran, Syria, Sudan, (North Korea) designated persons
- Lesser embargoes on other countries:
  - Burma, Belarus, Congo, Iraq, Ivory Coast, Lebanon, Liberia, Libya, North Korea, Zimbabwe, Somalia, Yemen
- Specially Designated Nationals (SDN)
  - One of a number of barred entity lists – However, there is a new Consolidated Screening List at: http://export.gov/ecr/eg_main_023148.asp

SOUTH SHIPPING LINE IRAN (a.k.a. SOUTH SHIPPING LINES IRAN COMPANY), Apt. No. 7, 3rd Floor, No. 2, 4th Alley, Gandi Ave., Tehran, Iran; Qaem Magham Farahani St., Tehran, Iran [NPWMD]
Practical Effects of Sanctions For Business Aviation

- Generally aircraft, engines, and parts can be freely exported without a license, except:
  - International Traffic in Arms Regulations (ITAR) covers:
    • Aircraft equipped with anti-missile technology
    • Certain night vision equipment and NVG compatible cockpits
    • Many former military helicopters
  - Certain civil systems including inertial navigation systems, may require a license to be exported, re-exported, or transferred to end-users in many countries
  - China military end-user restrictions

- However, because of U.S.-content rules, many business aircraft are of U.S.-origin and as such cannot be sold, leased or chartered to entities in Cuba, Iran, Syria, Sudan, North Korea
  - This is because of U.S.-content (de minimis rule)
Sale or Dry Lease

- A sale or long-term dry lease of a U.S.-origin aircraft or engine to a foreign person will be considered a permanent export of the aircraft, even if the aircraft will stay on the FAA registry.

- Generally, most civil aircraft, aircraft engines, and aviation components can be exported or re-exported (i.e., sold or leased) to most entities in most countries without a license. However:
  - Sale or dry lease to embargoed countries (e.g., Cuba, Iran, Syria, Sudan, North Korea) is prohibited
  - Sale or dry lease to a barred entity or for a barred end-use is prohibited
  - Sale where the seller knows or has reason to know the aircraft or engine is intended to be resold or leased to an embargoed country or barred entity or for a barred end-use
Operations to Embargoed Countries

• Temporary Sojourn Exception – BIS concept of “operational control” differs from common use in aviation industry:

• The operator must:
  i. have the right to hire and fire the cockpit crew
  ii. control the dispatch of the aircraft
  iii. have the right to determine the aircraft's routes (except for contractual commitments entered into by the exporter for specifically designated routes)
  iv. maintain (and base) the aircraft in a country other than an embargoed country (other than minimum necessary in-transit maintenance)
  v. not stage spares or a fly-away-kit in the embargoed country
  vi. not change the registration of the aircraft to an embargoed country register
  vii. not transfer of technology to a national of an embargoed country except the minimum necessary in-transit maintenance to perform flight line servicing required to depart safely
  viii. not change the livery, colors, or logos to that of the embargoed country
  ix. not fly under a flight number issued by an embargoed country
    • Does not apply to Iran
    • Does not necessarily authorize actions by US Persons

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Flight from Montreal to Havana on a Gulfstream G550

– Canadian carrier could fly their “C” registered or “N” registered aircraft on a scheduled or on-demand flight
– A Canadian private owner could fly a “C” registered aircraft (but would need a license if “N” registered)

• General Restrictions
  – Could not wet lease/ACMI, charter to Cuban person
  – Cannot base aircraft or spare parts in Cuba
  – Cannot carry unlicensed U.S. goods

• U.S. persons cannot facilitate such flight by providing routing, flight booking, or other services for such flight

• Contract Restrictions
  – Loan or lease may prohibit such flights
  – Insurance may be void for such flight
Flight From Fort Lauderdale to Havana

- For an U.S. air carrier to fly to Havana
  - Must be OFAC-licensed Carrier Service Provider (CSP) OR carrier acting as a direct air carrier for a licensed CSP
  - Must amend OPSPECS for Cuba operations
  - May only carry persons authorized under general or specific license
    - General license – Cuban-Americans visiting family
    - Special license – Person-to-person (P2P) license
  - May only carry authorized cargo
  - Only CSP can expend funds in Cuba
  - Must depart/arrive through Designated Portal Airport
- Private Operator will need a BIS license for the temporary sojourn and travelers must fall under general or special license
- Generally, if flight is authorized, support such as routing also authorized
- Practical issues
  - If you have an AOG in Cuba
  - Contract restrictions in loan, lease, insurance
  - Bank may detain wire transfers until they vet the transaction
How Much Should You Know About Your Customer?

• Due Diligence:
  – Reasonable and Practicable
  – Risk based assessment

• Operational Due Diligence:
  – Carrying charter customer from New York to Los Angeles
  – Long term ACMI of aircraft to air carrier in Lebanon

• Transaction Due Diligence
  – Entering into distribution agreement to sell aircraft parts to company in UAE
  – Sale of a jet to a publically traded company

• Screening against the SDN list not mandatory, but . . .

• Special concerns for public companies

• Contract provisions are not due diligence and offer little protection
Red Flags

Red Flag = Elevated Risk Transaction (Not that the deal is dead)

- 20/20 hindsight of enforcement agencies
- Additional diligence and/or contractual representations may be sufficient to proceed
- Important that red flags get reported up the chain
  - Ex: “New labels on Boxed Pipes”

Examples of Export/Embargo Red Flags:

- Buyer is foreign air carrier that doesn’t operate your type of aircraft
- Payment terms are unusual or routed through third country
- Parts buyer is not familiar with parts being ordered; doesn’t negotiate; ask about warranties, airworthiness
- Borrower, lessee strenuously object to export control restrictions in loan, lease
- Third party information (including Google)
Export Clearance for Sale or Long-Term Lease

- **Export Classification**
  - Aircraft fall under Export Classification Control Number (ECCN) 9A991.b.
  - No License Required (NLR) to most countries

- **Export Clearance**
  - Electronic Export Information (EEI) (replaced the Shipper’s Export Declaration (SED))
  - Destination control statement and EEI annotation on shipping documents
  - US Principal Party in Interest (USPPI) – many aircraft exports are “routed exports”

- **Customs Clearance**
  - Foreign carrier or ferry flight operator will have to comply with aircraft clearance for outbound flights (differ from private and commercial flights)
  - Customs broker files export manifest with Customs (including the aircraft and any other goods being exported with the aircraft) supported by:
    - Commercial or pro-forma invoice; use fair market value.
    - (Note: Under treaty, generally aircraft imports are not dutiable, but there may be general VAT issues)

- **Export Procedures Differ from Port to Port**
  - Some require 72-hour advance notice
  - Most require proof of airworthiness and registration
  - Some take fax/e-mail, others required pilot to deliver documents in person
Export Clearance – Other Issues

• **Hazmat**
  – Loose equipment, oxygen bottles, paint, etc., which may need to be declared as hazardous
    • Foreign air carrier’s issue

• **Flight Authorization**
  – Special Flight Permit – For ferry of “N” registered aircraft not being operated by a U.S. certificated air carrier on its certificate
  – Special Flight Authorization – For ferry of foreign registered aircraft that does not have foreign equivalent of U.S CofA
  – TSA International Waiver – Large commercial aircraft flying into/out of U.S. not under air carrier approved security program require TSA waiver

• **Export Certificate of Airworthiness**
  – Generally Designated Airworthiness Representative (DAR) will perform inspections
  – Upon de-registration, DAR will issue Export CofA on behalf of FAA

• **FAA De-registration**
  – De-registration letter filed with FAA
  – Return of registration certificate
  – Verify U.S. marks have been removed per FAR 45.33
Ethical Business Practices

• Foreign Corrupt Practices Act (FCPA)
  – Justice Department aggressive in penalizing bribery of foreign government officials
  – Multi-million dollar penalties
  – Travel Act – commercial bribery
  – Reputational harm

• Key Issues -- Aviation Industry
  – Officials of foreign airports and foreign state-owned airlines are “foreign government officials” under the FCPA
  – Grease payments to foreign airport/customs officials represent risk for operations
  – Foreign agents/brokers represent largest exposure for sales/lease transactions

• Importance of due diligence
Other Key Facts:

- Ignorance of the law is NOT a valid defense
- There is no materiality threshold
- Actions of an agent acting “on behalf” of a company are attributed to the company
- Actions of the foreign sub will be attributed to the U.S. parent
## U.S. FCPA vs. UK Bribery Act

<table>
<thead>
<tr>
<th>Provision</th>
<th>FCPA</th>
<th>Bribery Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is being bribed</td>
<td>Only bribes (“anything of value”) paid or offered to a “foreign official” are prohibited</td>
<td>Prohibits bribes to any person to induce them to act “improperly” (not limited to foreign officials)</td>
</tr>
<tr>
<td>Nature of advantage obtained</td>
<td>Payment must be “to obtain or retain business”</td>
<td>Focus is on improper action rather than business nexus (except in case of strict corporate liability)</td>
</tr>
<tr>
<td>“Active offense” vs. “passive offense”</td>
<td>Only the act of payment, rather than the receipt/acceptance of payment, is prohibited</td>
<td>Creates two offenses: (1) offense of bribing another (“active offense”) and (2) offense of being bribed (“passive offense”)</td>
</tr>
<tr>
<td>Corporate strict liability</td>
<td>Strict liability only under accounting provisions for public companies (failure to maintain adequate systems of internal controls)</td>
<td>Creates a new strict liability corporate offense for the failure of a commercial organization to prevent bribery (subject to defense of having “adequate procedures” in place designed to prevent bribery)</td>
</tr>
<tr>
<td>Business promotion expenditure</td>
<td>Affirmative defense for reasonable and bona fide expenditure directly related to the business promotion or contract performance</td>
<td>No similar defense (but arguably such expenditures are not “improper” and therefore not a Bribery Act violation)</td>
</tr>
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## U.S. FCPA vs. UK Bribery Act, Cont’d….

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<td>Allowable under local law</td>
<td>Affirmative defense if payment is lawful under written laws/regulations of foreign country</td>
<td>No violation if permissible under written laws of foreign country (applies only in case of bribery of foreign public official; otherwise a factor to be considered)</td>
</tr>
<tr>
<td>Facilitating payments</td>
<td>Exception for payment to a foreign official to expedite or secure the performance of a routine (non-discretionary) government action</td>
<td>No facilitating payments exception, although guidance is likely to provide that payments of small amounts of money are unlikely to be prosecuted</td>
</tr>
<tr>
<td>Civil/criminal enforcement</td>
<td>Both civil and criminal proceedings can be brought by DOJ and SEC</td>
<td>Criminal enforcement only by the UK Serious Fraud Office (SFO)</td>
</tr>
</tbody>
</table>
| Potential penalties        | **Bribery**: for individuals, up to five years’ imprisonment and fines of up to $250,000; for entities, fines of up to $2 million  
**Books and records/internal control violations**: for individuals, up to 20 years’s imprisonment and fines of up $5 million; for entities, fines of up to $25 million | For individuals, up to 10 years’ imprisonment and potentially unlimited fines; for entities, potentially unlimited fines |
The foreign corrupt practices prohibited by the FCPA consists of five separate elements:

1. A “covered person”
2. Corrupt Intent
3. Directly or Indirectly Offers, Promises or Gives Anything of Value
4. To a foreign official
5. To obtain or retain business
Exception 1: Promotional Expenses

• Any promotional expense-related payments must be:
  • Bona fide (e.g., legitimate)
  • Reasonable
  • **AND** directly related to the:
    – Promotion, demonstration, or explanation of products or services; or
    – Execution or performance of a contract with a foreign government or agency thereof
Exception 2: Facilitating Payments

Facilitating or “Grease” payments made to expedite or secure the performance of a routine governmental action by a foreign official are permitted by the FCPA but NOT many other countries’ laws (e.g., UK & Germany):

- Obtaining permits, licenses or other official documents
- Expediting lawful customs clearance
- Mail pickup and delivery, police protection, etc.
- Obtaining telephone service, electricity, water, etc.
- Obtaining issuance of entry or exit visas

Facilitating payments must be given to secure or accelerate performance of nondiscretionary acts that an official is already obliged to perform.
Business Gifts

**GIFT**

- Moderate in Cost
- Not Money (i.e., food or flowers)
- Items:
  - Small novelties
  - With company logo
  - Not related to gaining business
- To foster good will or build relationships

**BRIBE**

- Extravagant
- Money
- Items:
  - Large (big screen TV, motorcycle)
  - Related to gaining business
- An inducement or reward for business
Travel & Entertainment

- Reasonable in cost
- Customary practice
- You are in attendance (= entertainment)
- To foster good will or build relationships
- Specific business purpose

Bribe

- Expensive in cost
- Not customary
- You are not in attendance (= gift)
- An inducement or reward for business
- Tourist side trip

"Now, don't expect the bribes to start in right away — you have to prime the pump with some free samples first."
Recent Arrests of Airport Officials

Soekarno-Hatta Airport Immigration Chief Arrested
Arrested for allegedly violating Article 63 of the Criminal Code by forging travel documents. The document was used in a legal case involving a local company that questioned the authenticity of the document.

CBI Arrests 3 Customs Officials
Three Customs officials, including a superintendent attached to the air cargo unit of the Cochin International Airport, after they were found guilty of aiding in the smuggling of electronic equipment worth nearly Rs 28 crore, and taking a bribe for it.

Corruption Lands Former Airport Boss Behind Bars
The former boss of Beijing’s sprawling airport has been sentenced to 12 years in prison for taking bribes of more than 4.7 million yuan ($740,000 USD) in illicit payments between 1996 and 2009 to arrange jobs and set up corrupt deals.
Recent Arrests, Cont’d…

**Airline Sues Regulator Over Corruption**

The owner of a private airline has filed a bribery case against an official of the Civil Aviation Authority of Bangladesh (Caab). The case was filed because the Caab director demanded Tk 10 lakh bribe in exchange for issuance of a no-objection certificate (NOC).

**Corruption Dragnet Catches Small Fish**

The Anti-corruption Commission of Zimbabwe (ACCZ), has recently arrested several people including a legislator and council officials on corruption charges. Its actions have raised the hopes in the country to rid Zimbabwe of the scourge that is spreading like cancer.

**Chennai Airport Staff Face Gate Checks**

Airport officials have decided to tighten security after sleuths of the directorate of revenue intelligence (DRI) arrested an Air India catering superintendent and a Singapore-bound passenger for trying to smuggle Rs 20 lakh in US dollars out of the country.
FCPA & Gifts, Entertainment and Hospitality: Lessons from Enforcement Actions

- **BizJet International Sales and Support Inc. (2012)** paid an $11.8 million criminal fine and entered into a three-year deferred prosecution agreement with the DOJ to resolve FCPA offenses in Latin America. The DOJ’s one-count criminal information charged BizJet with conspiring to violate the FCPA’s anti-bribery provisions.

- **Lufthansa Technik AG (March 2012)**, BizJet’s German owner, entered into a three-year deferred prosecution with the DOJ. It agreed to provide ongoing cooperation and enhance its internal controls.

- **Biomet Inc. (2012)** paid a criminal fine of $17.3 million to resolve charges brought by the DOJ and $5.5 million in disgorgement of profits and pre-judgment interest to settle civil charges by the SEC. Indiana-based Biomet’s deferred prosecution agreement required a compliance monitor for 18 months.
Diageo (2011): The British spirits company that makes Johnnie Walker and Windsor Scotch whiskeys paid more than $16 million to settle FCPA charges with the U.S. Securities and Exchange Commission (SEC) for, in part, its gift-giving, travel, and entertainment practices.

- Spent approximately $64,184 on rice cakes (customary and traditional gifts in Korean culture) and other gifts for the South Korean military over the span of four years. Gifts ranged in value from $100 to $300 per recipient. Many of the recipient officials were responsible for procuring Diageo products.
- Provided more than $100,000 in travel and entertainment expenses to South Korean customs and other officials to inspect scotch facilities in Scotland, adding “purely recreational side trip[s] to Prague and Budapest.” Several expenses booked as “Entertainment – Customer,” hiding the fact that the recipients were officials.
- Spent approximately $165,287 on hundreds of non-traditional, non-seasonal gifts and entertainment for the South Korean military. The company called them “Mokjuksaupbi” payments (“payments for relationships with customers”). The SEC, however, found that approximately $106,000 of the payments were actually “for the purpose of influencing specific purchasing decisions.”
FCPA & Gifts, Entertainment and Hospitality: Unique and Lavish Bribes

- **Control Components (2009):** The DOJ settled with a control valves company for an $18.2 million criminal fine based on corrupt payments to officials in China, Malaysia, and the UAE.
  - Gifts included the payment of the college tuitions of at least two officials who were company clients.
  - Provided officials with five-star hotel rooms and charter boat trips in Hawaii and trips to Disneyland and Las Vegas “under the guise of training or inspection trips.” The DOJ stated that the “actual purposes of the trips were to reward the customers’ officers and employees for causing their employees to purchase defendant CCI products, retain current business from defendant CCI, and obtain new business for defendant CCI.”

- **Alliance Once (2010):** SEC settled with the U.S. tobacco company for $10 million in disgorgement for the bribes that employees and agents of the company’s subsidiaries paid to officials in numerous countries.
  - Bribes included lavish gifts like watches, cameras, and laptop computers in China and Thailand.
Red Flag/Warning Signs

- Review Red Flags/Warning Signs in Context

- Remember, they are illustrative not all inclusive

- Also known as –
  - Common sense test
  - Something just doesn’t feel right test
  - Tumia akili yako

If in Doubt, Check it
Questions?
DEDICATED TO HELPING BUSINESS ACHIEVE ITS HIGHEST GOALS.