Export control due diligence considerations

Government Contract Services

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US export control enforcers continue to apply the concept of successor liability when reviewing export control practices in businesses that have made recent acquisitions. It has proven to be an attractive enforcement area precisely because so many companies forget to consider export control during their mergers and acquisitions (M&A) process. M&A activity is already fraught with uncertainty, and with civil penalties for US export control capable of reaching over $1m per violation, it is imperative you understand the export implications for your business in M&A and how to mitigate the risks.

Export control gaps and violations are notoriously difficult to identify within large, complex businesses. Therefore, mitigating the risk of expensive or unforeseen liabilities throughout the M&A process begins with conducting adequate due diligence of the seller's export compliance record commensurate with their international profile and the complexity of their business. Buyers should understand the full extent of the seller's export control organization, including policies, procedures, internal audit reports, product classifications, disclosures, licenses, foreign subsidiaries or partners, brokers, records retention and more.

While understanding the seller's export control environment can provide greater confidence in the decision to purchase a company, buyers must also remember their responsibilities extend beyond the purchase itself. Over the years, US export control enforcement has sent a clear message that sanctions and export compliance measures must be in place at the acquired company immediately after any acquisition. There is no grace period and little to no space to deny responsibility for violations. Therefore, verifying that a plan exists to consolidate efforts and implement export control is crucial.

Together, due diligence and effective controls can protect your investment and provide dividends long after the purchase is concluded. A thorough understanding of the seller's export control environment can reveal avenues for applying the necessary controls swiftly. Additionally, open communication among parties involved with the transaction provides an opportunity to discover leading practices in export compliance, increasing the efficiency of your export organization. Remembering to consider export control during M&A quite simply provides the peace of mind that a costly surprise is not just hiding around the corner.

Now, next and beyond

Now: focus on the current state

- Review export control procedures conducted during recent merger activity — was export included in the risk assessment? Was misconduct found during diligence or post acquisition?

Next: change remediation of practices

- Has compliance been able to integrate different export control functions? Have you been able to implement an effective compliance program at the acquired entity?

Beyond: embed export considerations in strategic growth plan

- How will you incorporate export control procedures into future diligence activities? How will you refine data requests? How will you increase focus on foreign sales and subsidiaries of any targets?

Three steps to take now:

1 Conduct post-acquisition assessments to determine maturity of export controls and potential gaps

2 Review due diligence practices and build in steps for export control procedures

3 Confirm that foreign third parties related to recent acquisitions are being properly screened

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