



## ***13. Export Controls***

# **Export Control and International Contracting**

## **Risks Defense Contractors Face in Today's Global Environment and Mitigation Strategies to Address These Risks**

The information contained in this presentation is not, nor is it intended to be, legal advice. You should consult an attorney for individual advice regarding your unique set of facts and circumstances.

**Sean Sabin**  
**Sean.Sabin@Raytheon.com**  
**Senior Counsel**  
**Office of the General Counsel**  
**Integrated Defense Systems**  
**Raytheon Company**  
**March 12, 2014**

# Overview

---

- **National Disclosure and Export Controls**
  - What restrictions apply to the marketing, sale, transfer or disclosure of U.S. classified and unclassified defense articles, services or information to non-U.S. persons, governments or industrial entities?
- **Managing Third-Party Risk Inherent with a 21st Century Global Supply Chain System**
  - How should your company vet and select international suppliers and how should it structure and document its supplier relationships?
- **Offsets**
  - What are offsets, how do they work and how do they influence the outcome of international defense and aerospace competitions?
- **Foreign Corrupt Practices Act (FCPA)**
  - What is the FCPA and how can its violation result in severe penalties and loss of contracts?

# National Disclosure and Export Controls

- There are only two ways that U.S. defense articles, services or information can be approved for sale or transfer to non-U.S. entities
  - Transfer of **Classified** defense articles, information and services must comply with both United States:
    - **National Disclosure Policy (Releasability)**
    - **Export Licensing Procedures (Exportability)**
  - Transfer of **Unclassified** defense articles, information and services still must comply with United States:
    - **Export Licensing Procedures (Exportability)**

A country must have clearance for release of classified information before a license request will even be considered

## What is the National Disclosure Policy?

---

- Countries frequently make written requests for price and availability (P&A) data regarding US weapon systems or submit a Letter of Request (LOR) for a Letter of Offer and Acceptance (LOA) seeking information on the terms to buy or lease such items
- If these requests entail release of classified military information, an initial determination must be made as to whether the country making the request is already cleared for release of such information at the Confidential, Secret or Top Secret levels in accordance with criteria established by the US National Disclosure Policy (NDP)
- If the country is not cleared at the level needed to achieve release, then an Exception to National Disclosure Policy (ENDP) may be sought
  - This involves a review and voting process that includes various members of the Dept of State (DoS), Dept of Defense (DoD) and, as required, selected other agencies
- The bottom line is: furnishing classified military information to countries must be in the best interests of the US and must be consistent with US foreign policy objectives

# Exportability:

## What Are Export Licensing Procedures?

---

- The transfer of any classified and unclassified defense article, service or information requires an **export license** prior to its transfer to a foreign entity
- Technologies requiring an export license are divided into two main categories for export control purposes:
  - Military technology (with a strictly military application)
    - The Directorate of Defense Trade Controls (DDTC) is the DoS office responsible for implementing export controls of military technology
    - The exercise of this responsibility is done chiefly through the publication and application of the International Traffic in Arms Regulations (ITAR)
    - The US Munitions List (USML) (ITAR Part 121) describes all items designated as defense articles or services for export control purposes
  - Dual-use technology (with both military and civilian applications) and commercial technology
    - Dept of Commerce (DoC) through its Bureau of Industry and Security (BIS) exercises control of dual-use and commercial technology
    - BIS is responsible for implementing and enforcing the Export Administration Regulations (EAR), which regulate the export and re-export of most commercial items
    - The Commerce counterpart to USML is the Commerce Control List (CCL)

# Exportability:

## What Are Export Licensing Procedures?

- There are three major players in the U.S. export licensing arena
  - **DoS** is responsible for management and oversight of the **export control programs** for **military technologies**
  - **DoC** is responsible for management and oversight of the **export control programs** for **dual-use and commercial technologies**
    - Dual-use items are those designed with no intrinsic military application (e.g., trucks, computers, light aircraft, etc.)
  - **DoD** provides **critical input to both DoS and DoC** on the national security risks associated with proposed **sales or transfers** of **military and dual-use technologies to foreign countries**

Be aware of U.S. imposed embargoes on the transfer of defense articles and services to selected countries (ITAR Part 126.1)

The current list of embargoed countries can be found at this DoS website:

[http://pmdt.c.state.gov/embargoed\\_countries/index.html](http://pmdt.c.state.gov/embargoed_countries/index.html)

## What Are Export Licensing Procedures?

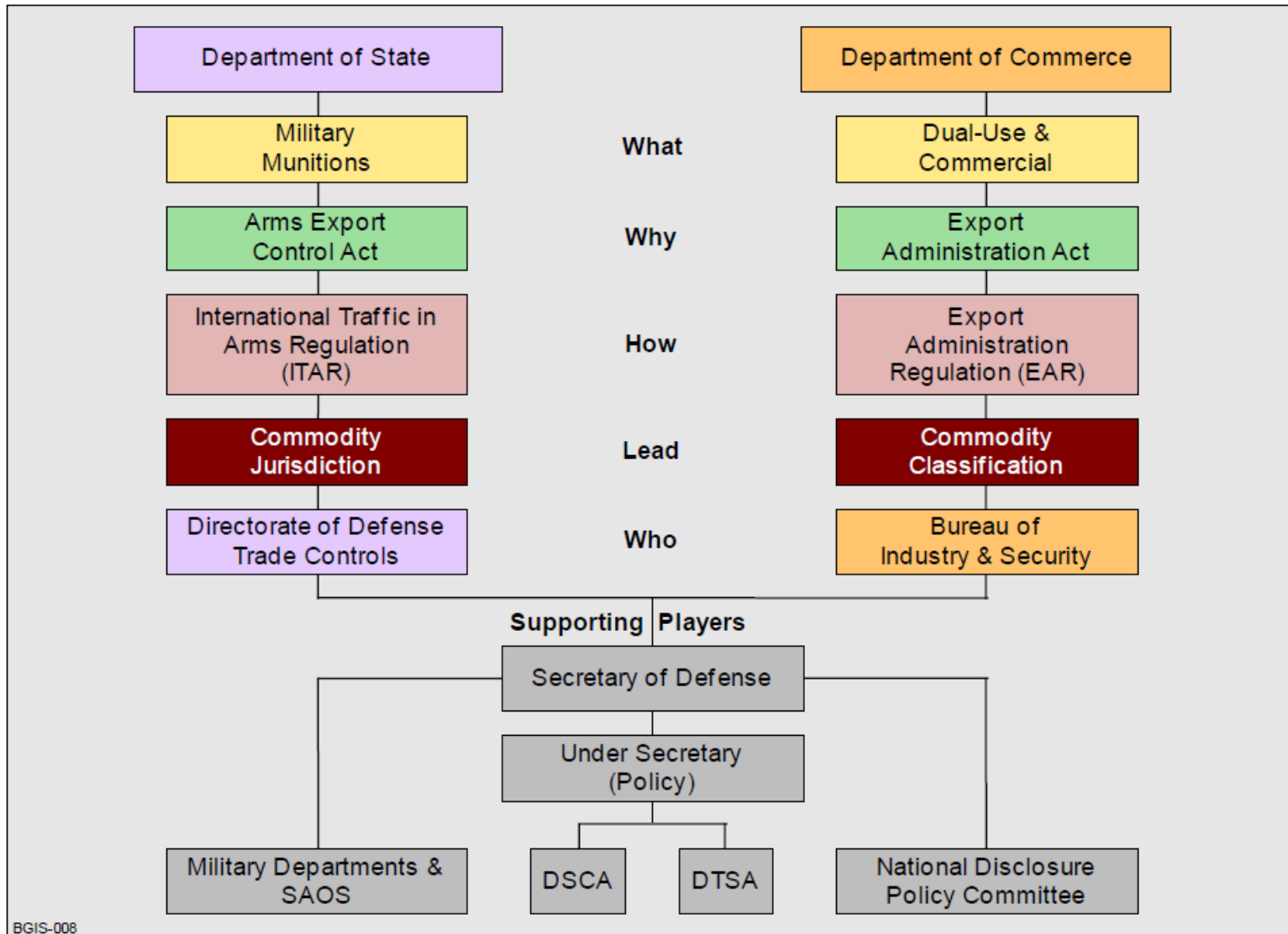
---

- The two primary organizations within DoD
  - Defense Technology Security Administration (DTSA) – the point of contact within DoD for the coordination of export licensing issues with DoS and DoC, works closely with both DDTC and BIS (reviews about 30,000 licenses per year)
  - Defense Security Cooperation Agency (DSCA) – the DoD activity that administers the Foreign Military Sales (FMS) program
    - Sales under FMS are government-to-government sales of defense articles and services to eligible governments
    - DSCA also approves Munitions License applications that have been initially approved by DTSA



# Exportability:

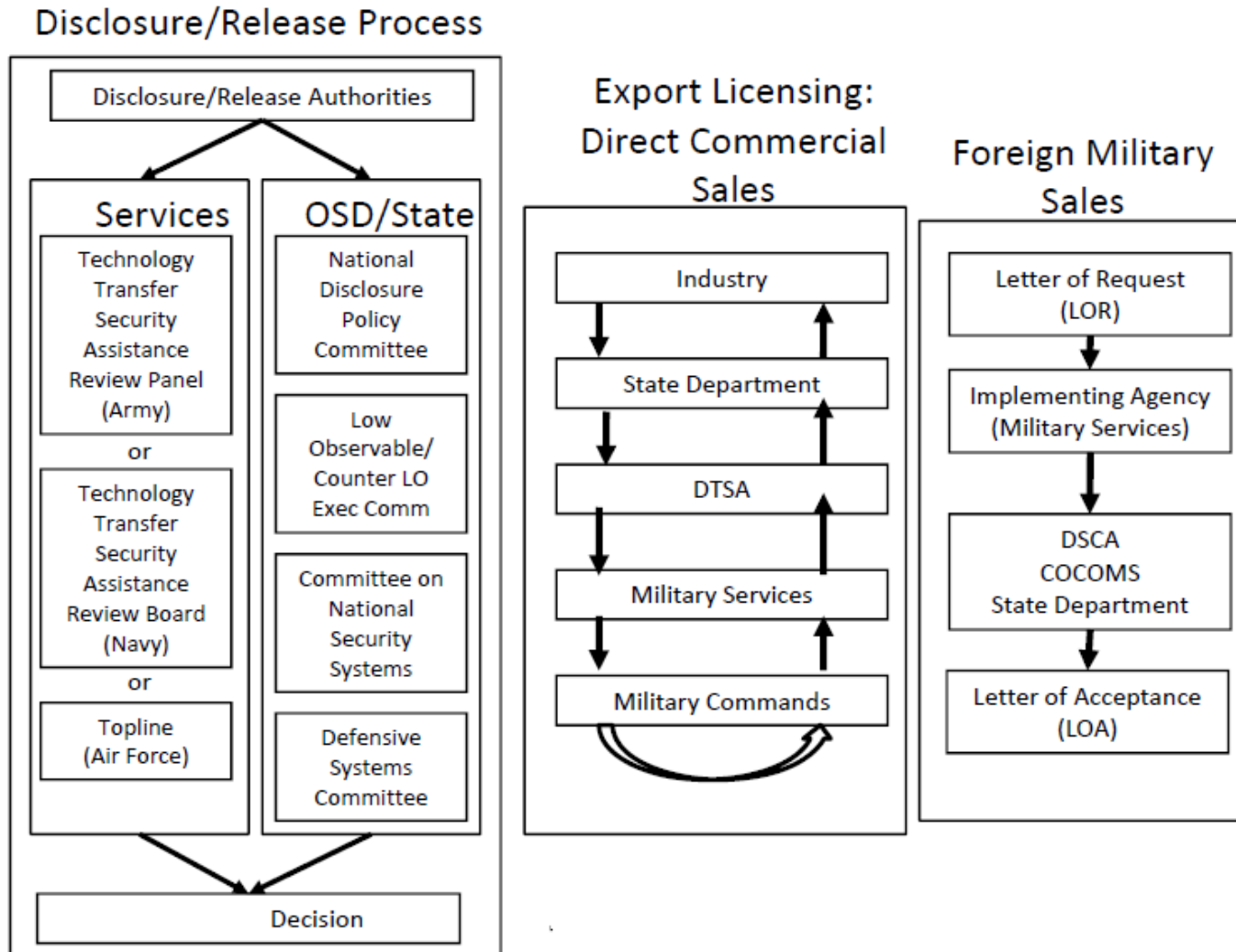
## What Are Export Licensing Procedures?



BGIS-008

# Exportability:

## What Are Export Licensing Procedures?



## What Are Export Licensing Procedures?

- DDTTC Export Licenses
  - DSP-85 Application for **Permanent/Temporary Export** or **Temporary Import** of **Classified** Defense Articles and Related Classified Technical Data
  - DSP-5 Application for the **Permanent Export** of **Unclassified** Defense Articles
    - Often technical data exchanged in pursuit of a program in a pre-contract stage, sometimes called a “marketing license”; for larger or technically complex programs DDTTC may require a Technical Assistance Agreement (TAA)
  - DSP-61 Application for Temporary Import of Defense Articles (often used in cases involving the repair of defense articles)
  - DSP-73 Application for Temporary Export of Defense Articles
    - May only be used to **temporarily export unclassified hardware**; any export of technical data is considered a permanent export (software is considered technical data)
  - DSP-83 Non-Transfer and Use Certificate
    - Included as a part of an application for authorization to export Significant Military Equipment (SME) and classified equipment or data; must be completed by the appropriate foreign persons (e.g., consignee, end-user, government) and forwarded to DoS through the US entity making the application

# Technical Assistance, Manufacturing License and Warehouse and Distribution Agreements

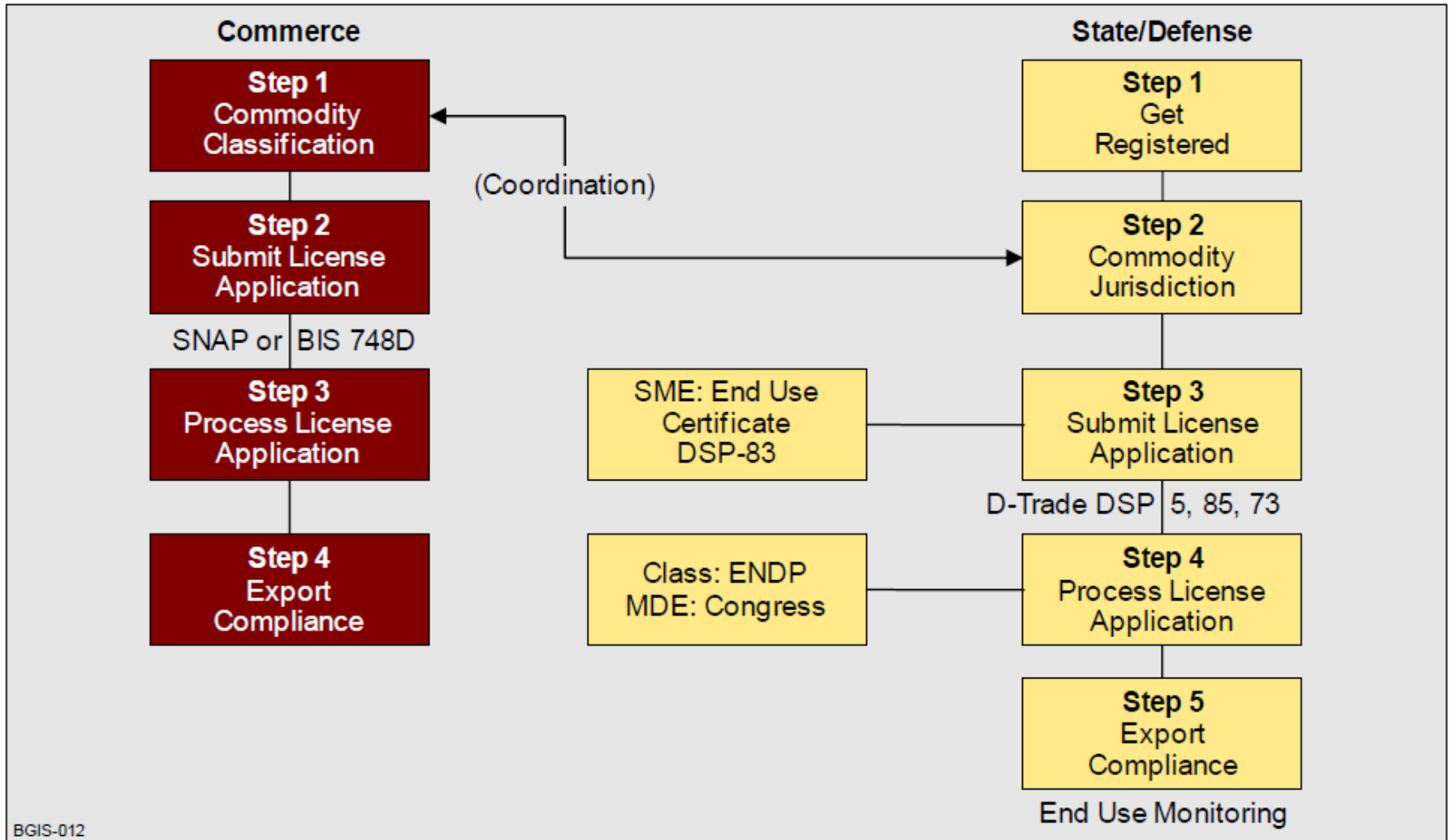
- A Technical Assistance Agreement (TAA) is an agreement between a US defense contractor and DDTC regarding authorized activities related to the performance of **defense services** or the **ongoing disclosure of technical data**
  - Often used when there will be ongoing technical interchange, whether before or after contract award, with a foreign person/entity/nation
- A Manufacturing License Agreement (MLA) is an agreement or contract that grants a foreign individual or company the **authority or license to manufacture or assemble defense articles abroad** and involves the export of technical data or defense articles or the performance of defense services by the US party
- A Warehouse and Distribution Agreement (WDA) is an agreement to establish a warehouse or distribution point abroad for defense articles to be exported from the US for subsequent distribution to entities in an approved sales territory
  - A WDA contains special distribution, end-use monitoring and reporting conditions
- TAAs, MLAs and WDAs take months to negotiate
- DDTC's "Agreement Guidelines" can be found at:  
<http://www.pmdtcc.state.gov/licensing/agreement.html>

# Significant Military Equipment

---

- A discussion with foreigners regarding the sale of SME requires prior notification and approval of the DoS; if the discussion involves classified information, prior notification and approval of the National Disclosure Policy Committee (NDPC) also must be obtained
  - Articles on the USML considered SME are identified by an asterisk
- In addition, Congress must be notified through the Congressional Notification (CN) process of the sale of Major Defense Equipment (MDE) to a foreign customer; this process can take many months
  - MDE is an SME item that has a nonrecurring R&D cost  $\geq$  \$50M or a total production cost  $\geq$  \$200M
- DDTC will not approve a license for the export of SME until a completed DSP-83 has been received
  - By signing the DSP-83, the foreign end-user stipulates it will not re-export, resell, or otherwise dispose of the articles/data identified on the DSP-83 to any other person

# The Mechanics of Export Licensing



BGIS-012

# The Mechanics of Export Licensing

## Commercial and Dual Use

### ▪ Step 1: Commodity Classification

- If unsure if the technology to be exported is commercial, dual-use, or a defense article or service
- On-line applications can be made for commodity classification via the BIS SNAP system (<http://www.bis.doc.gov/snap/>) or via BIS Form 748D
- If judged to be commercial or dual-use by BIS licensing officers, an Export Commodity Classification Number (ECCN) is assigned to the item using guidelines contained in the EAR
- If it is unclear as to whether something is a dual-use item or a defense article or service, DoC refers the request for commodity classification to DoS DDTC for review and adjudication
- Although they are subject to the EAR, only a relatively small percentage of items being exported and re-exported require submission of a license application to BIS -- a license is only required if the item is on the Commerce Control List (CCL)

# The Mechanics of Export Licensing

## Commercial and Dual Use

### ▪ **Step 2: Submission of License Requests**

- If an item subject to the EAR (commercial or dual-use item) is not specifically controlled by an ECCN, then it is properly classified as EAR 99, which means no license is required
- If you are required to submit a license for an item for any given country, you can submit it via SNAP or BIS Form BIS 748P and its appendix

### ▪ **Step 3: Process License Requests**

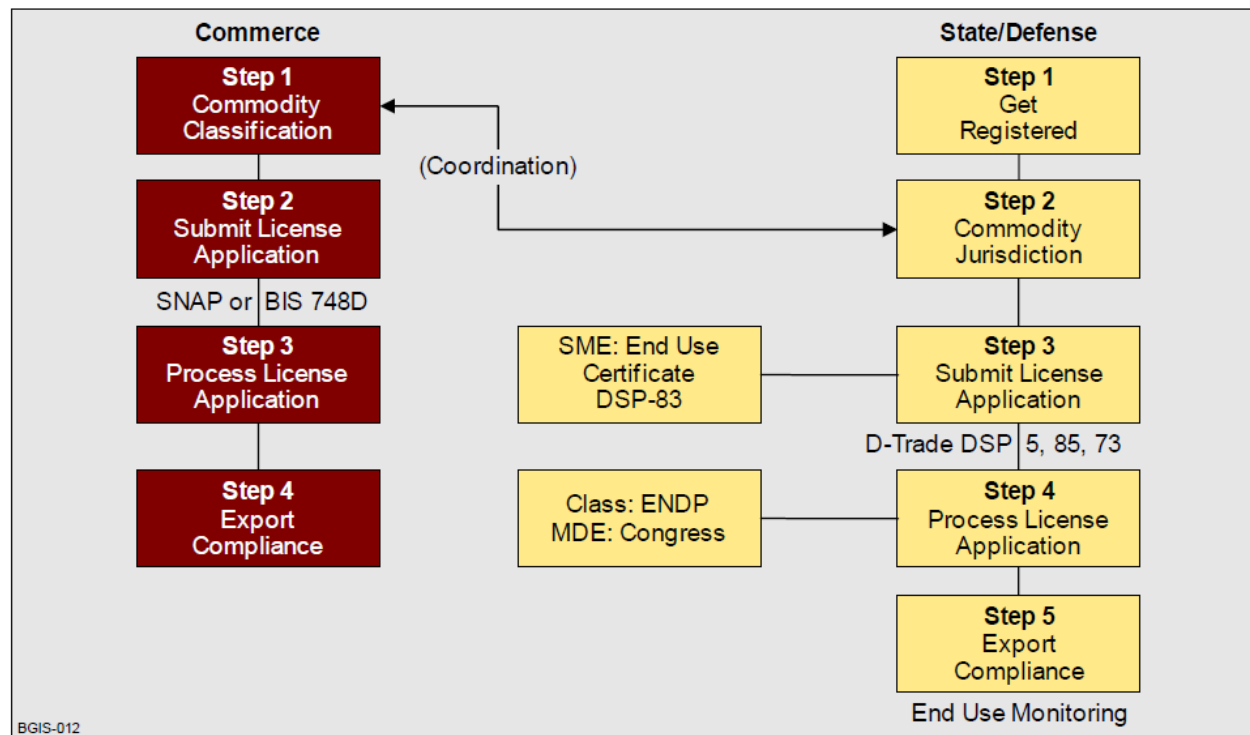
- DoD and DoS review virtually all license applications and the Dept of Energy (DoE) reviews all license applications that have items controlled for non-proliferation or missile technology reasons
- The Federal Bureau of Investigation (FBI) reviews all “deemed export” applications
  - A “deemed export” is an export of technology that involves release to a foreign national within the US
- Technology is released for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints), when technology is exchanged orally, or when technology is made available by practice or application under the guidance of persons with knowledge of the technology
- Without a license, technical presentations to foreign nationals must be limited to information that is in the public domain and presented using the same format and content as found in the public domain



# The Mechanics of Export Licensing Commercial and Dual Use

## ▪ Step 4: Export Compliance

- BIS's Office of Export Enforcement (OEE) is charged with export compliance for Commerce-issued licenses
- OEE works closely with the U.S. Customs Service in the broader control of all export actions, as there are frequent overlapping jurisdictional issues that bring more than one agency to a case



# The Mechanics of Export Licensing Defense Articles and Services

## ▪ Step 1: Get Registered

- The Arms Export Control Act (AECA) requires all US persons who manufacture or export defense articles or furnish defense services and all US or foreign persons engaged in arms brokering to register with DDTC

<http://www.pmddtc.state.gov/registration/index.html>

- The Treasury Department reviews information submitted by registrants to ensure there are no outstanding law enforcement issues regarding registrants
- Registration does not confer any privileges – it is simply a prerequisite to export licensing approval
  - Registration fees are \$2,250 - \$2,750 (dependent on how many licenses you submit per year)

## ▪ Step 2: Commodity Jurisdiction Request

- A Commodity Jurisdiction (CJ) request is submitted to determine whether an item or service is covered by the USML and therefore subject to DoS jurisdiction under AECA and ITAR ([http://www.pmddtc.state.gov/commodity\\_jurisdiction/index.html](http://www.pmddtc.state.gov/commodity_jurisdiction/index.html))

- DoS's equivalent to DoC's Commodity Classification

- Example: If a request is made to DoC seeking a dual-use Commodity Classification and DoC is uncertain whether dual use classification is appropriate, the request may end up at DoS for a recommendation and/or a CJ finding

# The Mechanics of Export Licensing Defense Articles and Services

## ▪ Step 3: Submission of License Requests

- Some license requests can be submitted electronically through DDTC's DTrade (<http://www.pmdrtc.state.gov/dtrade/index.html>):
  - DSP 5: Application for the Permanent Export of Unclassified Defense Articles
  - DSP 61: Application for Temporary Import of Defense Articles (often used in cases involving the repair of defense articles)
  - DSP 73: Application for Temporary Export of Defense Articles
- Other license requests still must be submitted by mail:
  - DSP 85: Application for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Related Classified Technical Data
  - DSP-83: Non-Transfer and Use Certificate
  - DSP-1 19: Application for an Amendment to a License
- “Based on envisioned expansion of electronic processing capabilities, DDTC anticipates, with few exceptions, most export licensing submissions via DTrade in the near future.”

# The Mechanics of Export Licensing Defense Articles and Services

## ▪ **Step 4: Processing of Licenses**

- During its review, DDTC conducts a computerized review of all parties to a proposed transaction to make sure no parties are named on watch lists of known or suspected export violators
  - If a match occurs, DoS conducts a full compliance review before taking final action on the application
- About 30% of license applications (“cases”) processed by DoS are referred to other offices or agencies for review, with about 85% of these cases being sent to DoD; this is also known as “staffing a case”
- In addition to sorting through detailed specifications, the license application review process clarifies the ultimate end-use and end-user of the defense export
- It also establishes facts related to intermediate handling, or a “trail of control,” should the defense articles eventually wind up in the wrong hands
- When submitting a license application, a company must certify to its eligibility to export and its understanding of the laws and regulations governing such exports

## ▪ **Step 5: Export Compliance Program**

- Make sure your company has one, that it is taken seriously, and that it encourages the voluntarily reporting of both intentional and inadvertent violations of rules and regulations

# Other Export Control Considerations

## ▪ Foreign Visit Control Procedures

- An official foreign visitor to a ITAR-covered defense contractor must have an approved Foreign Visit Request (FVR)
- FVR must be made by the foreign government
  - The contractor should not become involved in the visit request process on behalf of the foreign visitor
  - The cognizant Defense Security Service (DSS) regional office forwards approved foreign visit requests to the contractor
- Foreign visits to commercial facilities are considered “non-sponsored” unless supporting an official USG purpose and formally sponsored by the USG
- These visits must be restricted to the exchange of public domain information or comply with the provisions of prevailing TAAs, MLAs, or licenses

## ▪ Defense Security Service (DSS)

- Verify the export of classified articles and technical data against the license or the US company’s empowered official’s certification
- Decrement the license documenting the items being shipped and the dollar amount
- Ensure appropriate transportation plans (TPs) are in place for commercial overseas shipments of classified material and approve contractor arrangements to hand-carry classified document internationally (DSS - International Division)

# Other Export Control Considerations

## ▪ Technology Control Plan (TCP)

- Provides guidance on the control of access to classified and unclassified export controlled information by foreign nationals employed by and long-term foreign national visitors assigned to a cleared US contractor facility
- Developed by the US contractor, based on ITAR requirements and the National Industrial Security Program Operating Manual (NISPOM), and approved by DSS
  - The NISPOM (DoD 5220.22-M) establishes the standard procedures and requirements for US contractors that have classified information
- The TCP is a “how to do it” document that explains how ITAR, EAR and NISPOM requirements will be carried out

## ▪ Penalties for Arms Export Control Act (AECA) violations

- Significant fines (up to \$500K/\$1M per violation for civil/criminal violation), jail time, debarment for a period of time from obtaining export licenses and/or from receiving USG contracts
- A contractor also can enter into a Consent Agreement, which can ensure, among other things, that the company takes active measures to prevent similar violations in the future
- A timely voluntary disclosure may be a mitigating factor in DDTC’s decision regarding the level of administrative penalties to be imposed, if any, BUT ...
  - ITAR 127.12(b)(3): “It is possible that the activity in question despite voluntary disclosure might merit penalties, administrative actions, sanctions, or referrals to the Department of Justice (DoJ) for consideration as to whether criminal prosecution is warranted.”

# Global Supply Chain Management

## Managing Third-Party Risk

---

### ▪ Vetting and Selecting Suppliers

- Create a risk analysis matrix that assesses the country of incorporation, ownership and type of work third-party suppliers will perform
- Due diligence should grade suppliers based on the degree of risk and then assign them to categories
- For low-level risk, do an internal review of things like ownership, financial health and whether they appear on any sanctions blacklists
- For mid-level risk, ask the third party to complete a due diligence questionnaire and conduct a more detailed review of their directors and shareholders
- For high-risk, such as suppliers that interact with foreign government officials or state-owned enterprises in countries where kickbacks are common, consider using a firm to put together an independent due diligence report
- Thoroughly check references with key partners in high-risk jurisdictions, particularly in less transparent markets
- Keep thorough records of all due diligence

# Global Supply Chain Management

## Managing Third-Party Risk

---

- **Structuring and Documenting the Supplier Relationship**
  - Risk mitigation through negotiations and contracts – while most international relationships don't warrant a heightened scrutiny and can be established using standard templates and negotiation, high-value and/or high-risk relationships must be structured so that your company is as protected as possible
  - Prior to negotiations determine where you want the relationship to end up
    - What's this going to look like when it's up and running?
    - What are the key risks?
    - What can be done to minimize those risks?
  - Create risk guidelines to make risk assessment easier and quicker during the heat of negotiations
    - The guidelines should detail which terms and conditions can be accepted, as well as which ones are preferred and which are deal breakers on issues such as warranties, indemnities, liability limits, etc.



# Global Supply Chain Management

## Managing Third-Party Risk

---

- **Structuring and Documenting the Supplier Relationship**
  - Establish appropriate audit rights and requirements that suppliers undergo compliance training
  - Whenever possible, include a provision in your contract that allows your company access to the supplier's books and records that are relevant to your business and the right to inspect the areas of their facilities involved in the manufacture, transport or distribution of your product to make sure they are complying with all regulations, your code of conduct, etc.
  - Include strict compliance covenants in supplier contracts that describe prohibited conduct (FCPA compliance, ITAR compliance, no transactions with embargoed countries or restricted parties, etc.)

# Global Supply Chain Management

## Managing Third-Party Risk

---

### ■ Monitoring and Evaluating

- Don't award the subcontract and then fail to follow-up ... monitoring and evaluating is where companies most often fail
  - Many companies conduct thorough due diligence at the beginning of a new third-party relationship, negotiate contract provisions to get the right to monitor and evaluate behavior, and then fail to continue implementing these risk mitigation strategies after the subcontract is awarded
- Send questionnaires every year asking for updates/confirmation whether there has been any changes in ownership, whether all required paperwork has been filed, whether compliance training has been conducted, whether security standards to prevent data breaches are being adhered to, etc.
- Don't ignore problems once they have been identified
  - You must monitor the actions of your suppliers/partners AND respond appropriately to any issues that arise
  - Have a plan in place, both within your company and within the subcontract document itself, so identified issues can be remedied efficiently and effectively

# Offsets

- **What are offsets?**
  - The requirement imposed by foreign governments acquiring defense and aerospace goods from contractors in the United States or other countries to “offset” outflow of funds with the inflow of “offsetting” economic benefits to the importing country via co-production/development, industrial cooperation, technology transfer, subcontracts, etc.
  - In other words, any transaction that effectively generates direct or indirect economic benefits to the procuring country as a consequence of defense sales
  - Also called Industrial Cooperation, Work Share, Industrial Participation, Industrial and Regional Benefits, and Countertrade
- The use of offsets is explicitly prohibited in the WTO Government Procurement Agreement, which has 70+ party or observer nations ... BUT
  - “Nothing in the GPA shall be construed to prevent any Party from taking any action ... which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.”
  - As a result, offsets are imposed by ~85% percent of the world’s countries.
- Offset is a consequence of sale – to get the sale, an offset agreement is required

# Offsets

## Offsets in Defense Trade

### Seventeenth Study

Conducted Pursuant to Section 723 of the Defense  
Production Act of 1950, as Amended



U.S. Department of Commerce  
Bureau of Industry and Security

February 2013

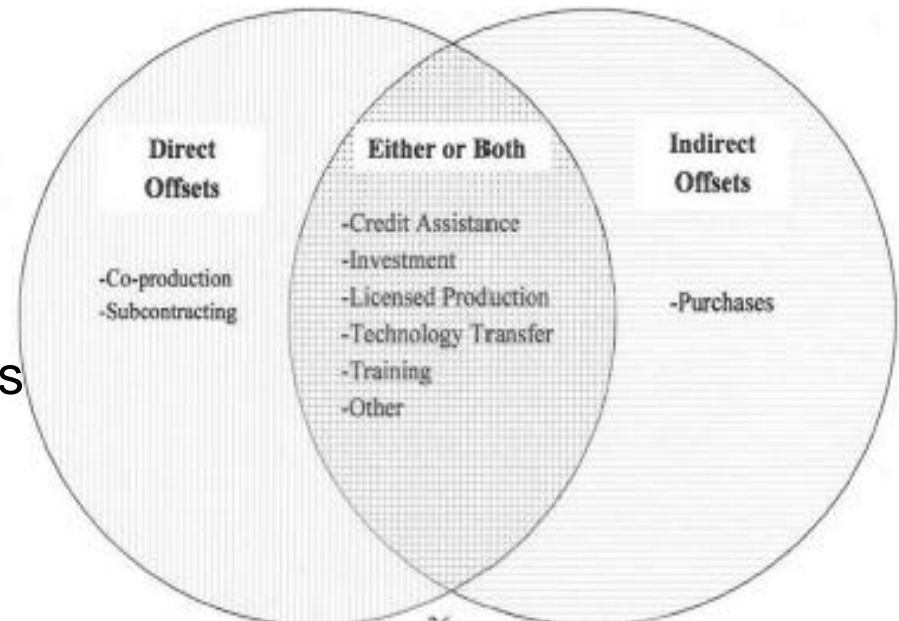
During 1993-2011, 53 U.S. firms reported entering into 830 offset-related defense export sales contracts worth \$122.67 billion with 47 countries. The associated offset agreements were valued at \$83.73 billion.

Year	Contract Value (\$ millions)	Offset Agreement Value (\$ millions)	Percent of Offset Agreement to Contract Value	U.S. Firms (Number)	Agreements (Number)	Countries (Number)
1993	\$13,935.00	\$4,784.43	34.33%	17	28	16
1994	\$4,792.42	\$2,048.72	42.75%	18	49	20
1995	\$7,529.92	\$6,102.58	81.04%	20	47	18
1996	\$3,119.67	\$2,431.62	77.94%	16	53	19
1997	\$5,925.47	\$3,825.53	64.56%	15	60	20
1998	\$3,029.20	\$1,768.15	58.37%	12	41	17
1999	\$5,656.62	\$3,456.89	61.11%	10	45	11
2000	\$6,576.21	\$5,704.81	86.75%	10	43	16
2001	\$7,116.00	\$5,549.55	77.99%	12	35	13
2002	\$7,406.23	\$6,094.81	82.29%	12	41	17
2003	\$7,293.05	\$9,110.44	124.92%	11	32	13
2004	\$4,927.51	\$4,329.69	87.87%	14	40	18
2005	\$2,259.87	\$1,464.13	64.79%	8	25	18
2006	\$5,088.53	\$3,573.91	70.23%	14	46	21
2007	\$6,735.74	\$5,437.57	80.73%	11	44	19
2008	\$6,286.16	\$3,664.43	58.29%	15	53	17
2009	\$10,700.53	\$6,696.44	62.58%	13	59	21
2010	\$3,524.81	\$2,200.77	62.44%	14	30	14
2011	\$10,764.62	\$5,481.60	50.92%	9	59	27
<b>Total</b>	<b>\$122,667.56</b>	<b>\$83,726.09</b>	<b>68.25%</b>	<b>53</b>	<b>830</b>	<b>47</b>

Source: BIS Offset Database  
Note: Due to rounding, totals may not add up exactly. Figures for certain previous years have been revised.

# Offset Types

- **Direct Offsets** – Contractual arrangements that involve defense equipment and services directly related to the product being sold
- **Indirect Offsets** – Contractual arrangements that involve transactions unrelated to the arms exports set forth in the prime contract
- **Semi-direct Offsets** – Transactions directly related to other activities of the Seller. Diversified companies involved in large offset deals may use the resources of their other affiliated companies to satisfy their offset requirements



# Offsets

- Public Law 102-558, the President's Offset Policy, excludes USG agency involvement in an offset transaction
- The LOA between the USG and the FMS customer and the FMS contract associated with that LOA (between the USG and the contractor) cannot include any of the terms of the offset agreement (such as the delivery schedule, acceptance criteria, etc.) even though the LOA and the contract may include costs associated with the offset
  - The offset agreement between the FMS customer and the contractor is a separate agreement, and it remains distinct and independent of the LOA and the contract
  - DFARS 225.7303-2(3)(ii) states that the USG assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs
- A US defense contractor may recover all costs incurred for offset agreements if the LOA is financed wholly with customer cash or repayable foreign military finance credits
  - When the LOA is being written, estimated offset costs are included, if known, in the line item price for the required contracted item
  - After the LOA is signed and prior to contract signature, the contracting officer must determine whether the proposed offset costs are reasonable, allowable and allocable

# Foreign Corrupt Practices Act

---

Congress enacted the FCPA in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies

“Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.”

United States Senate, 1977

# Foreign Corrupt Practices Act

---

- The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace
  
- The Act
  - Prohibits bribery of foreign government officials
  - Requires accurate and transparent books and records
  - Requires appropriate internal controls
  - Is a criminal statute, violation of which can result in substantial fines, prison and civil penalties for companies and individuals

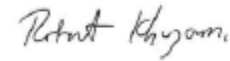


# DoJ's 2012 FCPA Resource Guide

The *Guide* is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities. We are proud of the many lawyers and staff who worked on this project, and hope that it will be a useful reference for companies, individuals, and others interested in our enforcement of the Act.



**Lanny A. Breuer**  
Assistant Attorney General  
Criminal Division  
Department of Justice



**Robert S. Khuzami**  
Director of Enforcement  
Securities and Exchange Commission

November 14, 2012

## FCPA

*A Resource Guide to the U.S. Foreign Corrupt Practices Act*

By the Criminal Division of the U.S. Department of Justice and  
the Enforcement Division of the U.S. Securities and Exchange Commission



<http://www.justice.gov/criminal/fraud/fcpa/guidance/>

# FCPA Anti-Bribery Provisions

---

- Illegal to provide anything of value to a foreign government official or political party anywhere in the world to obtain or retain business or secure any improper advantage
- Elements of an FCPA Violation (“quid pro quo”)
  - US person, US business, or US publicly traded Company
  - Payment or offer/promise to pay or give
  - Anything of value
  - Directly or indirectly
  - To a foreign official or a third party to convey to foreign official
  - To influence an act or decision of a foreign official or to secure business advantage
  - To obtain, retain or direct business
  - Actual knowledge of offer or payment of anything of value is not required

# Payment of Anything of Value

---

- Money
- Stock
- Gifts
- Unreasonable entertainment
- Loan forgiveness
- Business terms not commercially available
- Discounts not available to the general public
- Employment or consulting positions
- Free access to company or employee property
- Charitable contributions

No Exception for De Minimis Value

# Improper Travel & Entertainment

---

- Department of Justice examples
  - \$12,000 birthday trip for a government decision-maker from Mexico that included visits to wineries and dinners
  - \$10,000 spent on dinners, drinks, and entertainment for a government official
  - Trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in “pocket money” for each official
  - Trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle

# Directly or Indirectly

---

- If prohibited directly, also prohibited indirectly
  - Foreign affiliate, sales representative, joint venture partner, distributor, prime/subcontractor, teaming partner, etc.
- Standard
  - A company is responsible if one of its employees actually knows a foreign official is being bribed or if he or she is are aware of a high probability of bribery of a foreign official
  - Willful blindness or deliberate ignorance is not a defense
  - Affirmative duty to inquire if potential quid pro quo
- Business can be found in violation if its agent or representative is found in violation

# Foreign Official

---

- Any officer or employee of a non-US government
- Any person acting in an official capacity for or on behalf of any such government or instrumentality
- May include officers and employees of state-owned or state-controlled enterprises
  - Does the government have a majority interest?
  - Does the government effectively control the entity?
- Includes political parties and candidates

# Corrupt Intent

---

- Person making, offering to make, or authorizing payment must intend to induce recipient to misuse his official position to wrongfully direct business or maintain business or to secure any improper advantage.
- Corrupt intent can be assumed if:
  - Recipient is not qualified to perform the work for which he/she is receiving payment
  - The payment or benefit is not commensurate with the work the recipient is performing
- Washington Post Test: Would both the business and the recipient be comfortable if the payment were disclosed in the media?

# FCPA Accounting Provisions

---

In the past, “corporate bribery has been concealed by the falsification of corporate books and records” and the accounting provisions “remove[] this avenue of coverup.”

The accounting provisions are designed to “strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of [the United States] system of corporate disclosure.”

United States Senate, 1977



# Books, Records and Internal Controls

---

- Requires that books, records and accounts be kept in reasonable detail to accurately and fairly reflect transactions and dispositions of assets, and
- Company must have a system of effective internal accounting controls
  - Intentional misrecording of any payment is a violation
  - Prosecutor does not have to prove that payment was a bribe
  - Failure to describe what actually occurred could be a violation

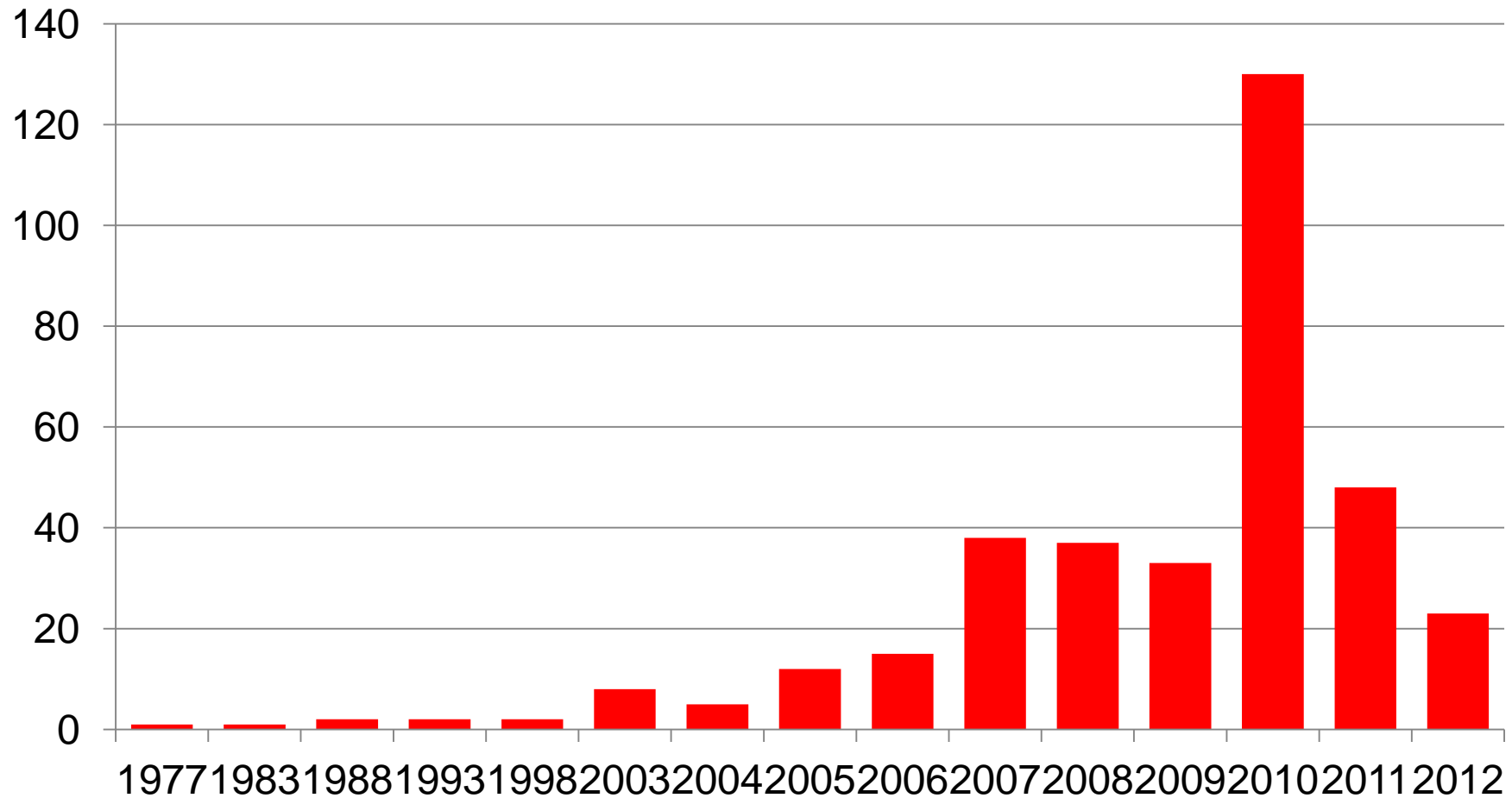
# FCPA Violation

---

- For each violation of the anti-bribery provisions
  - Corporate fine of up to \$2 million and individual fines of up to \$100,000
  - Imprisonment for up to 5 years
- For each violation of the accounting provisions
  - Corporate fine of up to \$25 million and individual fines of up to \$5 million
  - Imprisonment for up to 20 years
- Debarment and suspension from US contracts and/or foreign government contracts
- Collateral civil litigation (shareholder suits)
- Loss of export privileges
- Loss of reputation
- Prosecution under foreign laws

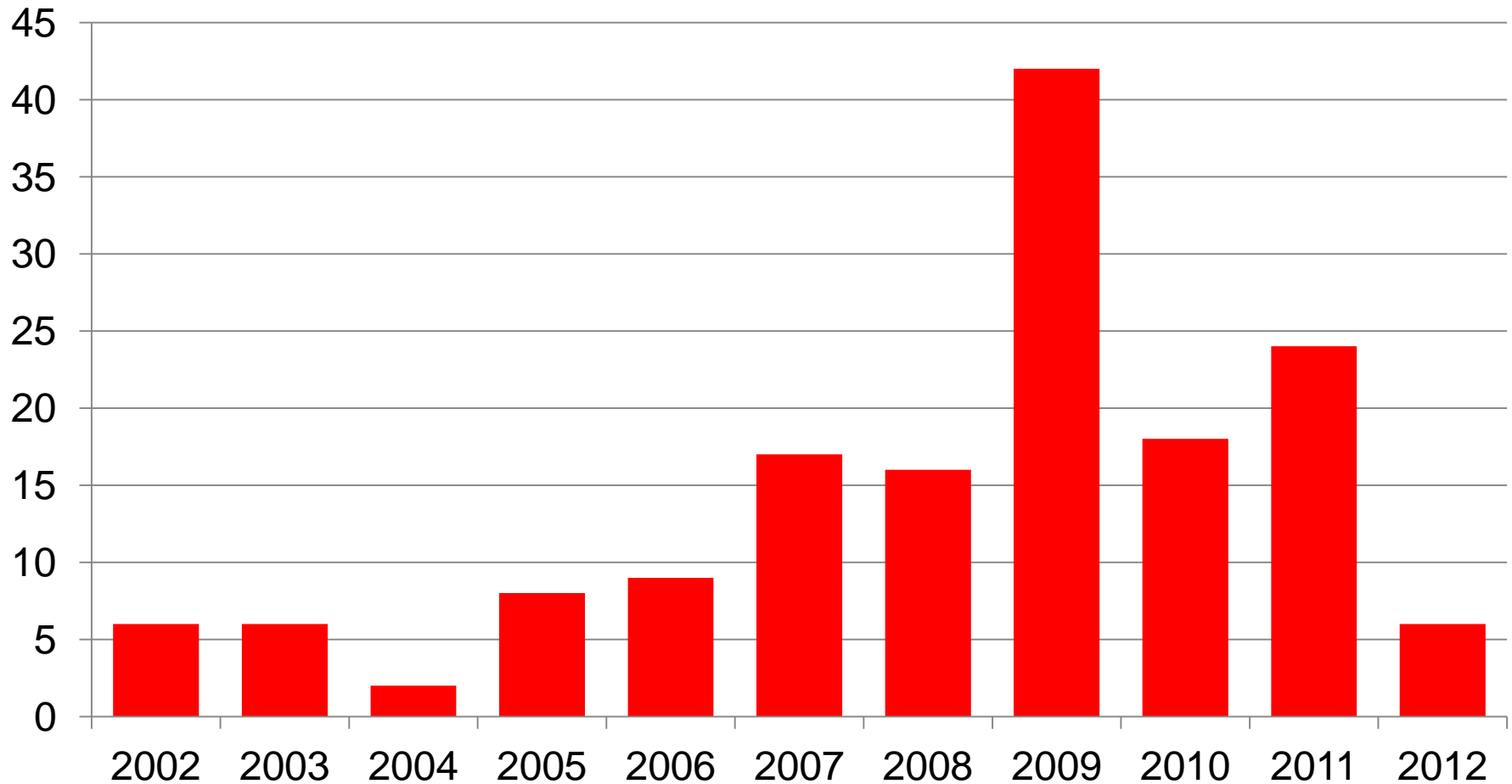
# FCPA Enforcement Actions

## Number of SEC and DOJ Enforcement Actions



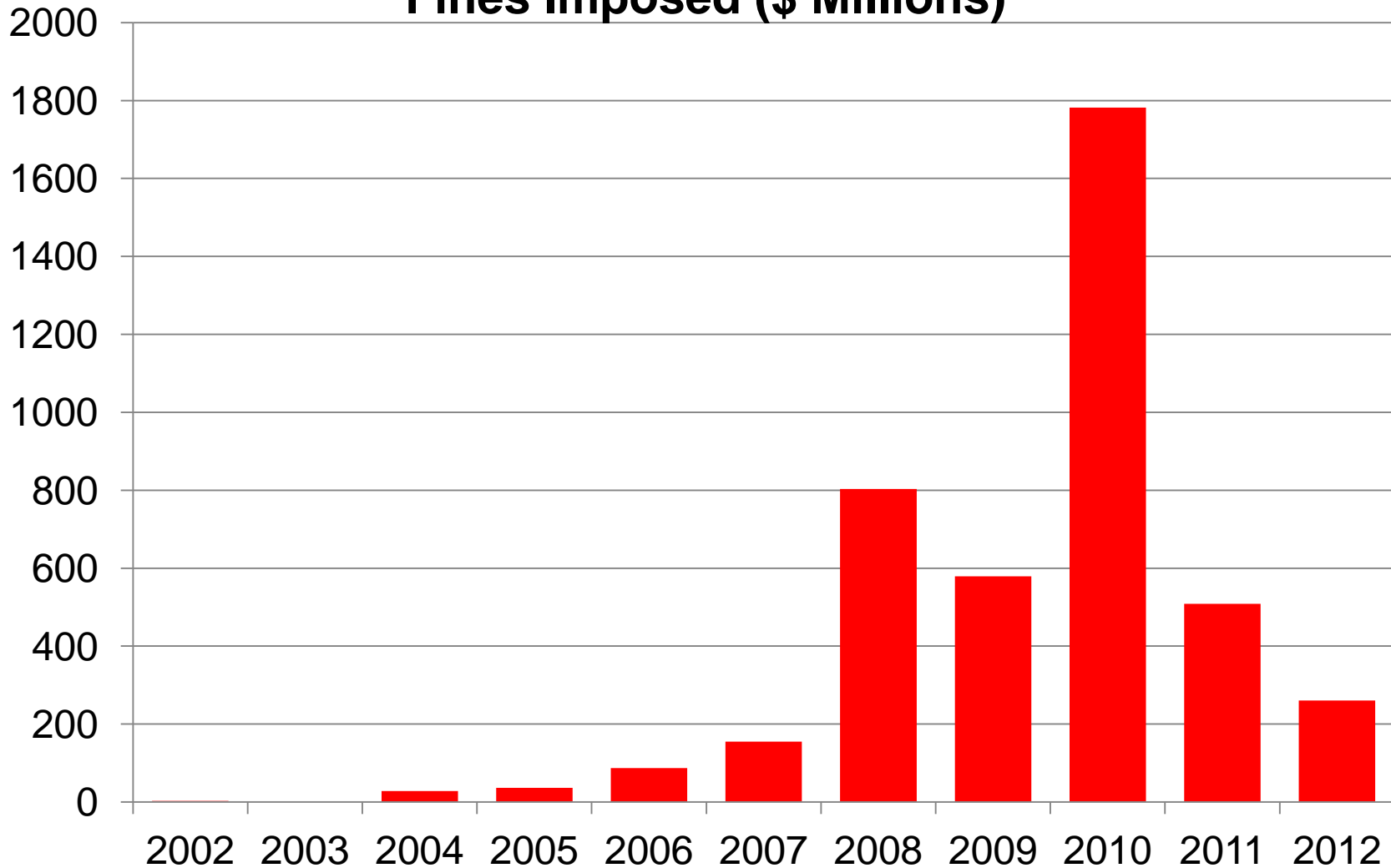
# FCPA Enforcement Actions

## Number of Individuals Charged by SEC and DOJ



# FCPA Enforcement Actions

## Fines Imposed (\$ Millions)



# Allegations Can Be Devastating

“Stock slides as probe into NCR foreign business practices continues”

*Atlanta Journal-Constitution*  
August 15, 2012

